ORIGINAL

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UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

BRIAN BURKE, Plaintiff, vs. NEW YORK CITY TRANSIT AUTHORITY, JOHN/JANE DOE, *ET AL.*, Defendants	Case# 15-cv-1481(ENV)(LB) **OPPOSITION TO MOTION TO DISMISS AFFIRMATION AND MEMORANDUM OF LAW AND ATTACHMENTS** **ORAL ARGUMENT REQUESTED**

AFFIRMATION AND MEMORANDUM OF LAW

I declare, certify, verify, and state under penalty of perjury that the foregoing is true and correct.

Executed on Friday, April 14, 2017 [signature] /S/:

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

15-cv-01481 (ENV)(LB)

Plaintiff,

vs.

Defendants.

OPPOSITION TO MOTION TO DISMISS AFFIRMATION AND MEMORANDUM OF LAW AND ATTACHMENTS

ORAL ARGUMENT REQUESTED

AFFIRMATION AND MEMORANDUM OF LAW

... under penalty of perjury that the foregoing is true and correct.

Executed on April 11, 2017

REC'D: 4/17/2017 @ 11:30 AM

Petitioner Brian Burke respectfully serves and files instant Opposition to scheduled Motion to Dismiss Second Amended Complaint.

STATEMENT OF FACTS & BAD FAITH

Petitioner/Non-Movant unfortunately must sound like a broken record in again informing the Court of the continued torrent of Bad Faith behavior by NYCTA Department of Law. Where to start? Well, let's start *with the instant motion. As Defendant is aware,* Petitioner is, at this time acting, lawfully, *pro se.*[1]Petitioner, *pro se*, is required to be served, and to serve, via 'hard copy' or paper, instead of ECF. Defendant, via Letter to the Court (Doc. 38) dated

[1] Due to Wire/Mail Fraud. NYCTA has been withholding/converting/stealing earned wages, overtime pay, vacation and sick pay of approximately 50K for over two years without even a pretext, see *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133 - Supreme Court 2000. Defendant has also, despite substantiation before an Administrative Law Judge, after substantial hearings and evidence, and a unanimous Workers Compensation Board Panel, criminally withheld Workers Comp claim, contractual differential and medical payments due strictly as retaliation for protected activity. The unlawful fraud has caused a, so far, successful interference with constitutional right to counsel.

January 23rd 2017 requesting Motion or 'briefing' schedule of March 3, 2017 for service for their MTD and April 21, 2017 for Opposition and May 5, 2017 for Reply. On Friday January 20, 2017 Mr. Chiu left a voicemail at 1:11pm and Petitioner replied next working day by email. Mr. Chiu then submitted an additional motion/briefing schedule request next day (doc. 39) dropping Plaintiff's time to Oppose by one week. This *Court, by Order*[2], *granted this request. So March 3 it* is. Or is it?

UNTIMELY MOTION TO DISMISS

On March 3, Petitioner checked mailbox. No Motion to Dismiss. On March 4, 2017, again no MTD. On Sunday, March 5, 2017, no MTD. On Monday, March 6, no MTD. Tuesday afternoon, March 7, 2017, Petitioner checked

[2] "The proposed briefing schedule [39] is approved and adopted. Defendants' motion to dismiss will be served on or before March 3, 2017; any opposition by plaintiff will be served on or before April 14, 2017; any reply by defendants will be served on or before April 28, 2017.Once fully briefed, the motion papers shall be filed pursuant to the Court's Individual Rule III.D. Ordered by Judge Eric N. Vitaliano on 1/25/2017. (Simeone, Julie)"

mailbox, no MTD. USPS (see att.) for tracking # 9405509898642006904693 shows it was delivered after checking, at 4:25pm 03/07/17 and was retrieved on March 8, 2017. As USPS clearly state in their electronic tracking equipment, the envelop (also att.)containing the Defendant's Memorandum of Law, Declaration In Support and required Notice to Pro Se Litigants was placed in the custody of USPS at 4:37pm on March 6, *2017. Not March 3, 2017, or March 2, 2017. Three days* late. Thus, as a matter of law, untimely, with no 'good cause' (or any cause). More Retaliation perhaps? Or just Bad Faith? Well, let's review the reason, or reasons for this, as yet, *sub rosa,* violation of this Court's Scheduling Order of 01/25/17. Petitioner sees none, in MTD Memorandum, Declaration, Letter to Court, ECF, or anywhere in record. Of course, this prejudicial, apparently intentional, contempt of this Court's Order, which merely complied/comported with Defendant's serial demands, evidences NYCTA's utter disregard for the rule of law (unless, of course, the 'rule of law' is beneficial to NYCTA management). Please see attached The Case of the Untimely Summary Judgment Motion: The Mystery of What Constitutes 'Good Cause' for Missing the Deadline **The United States Law Week**, 82 U.S.L.W. 1372, 3/18/14. "*Perez v. Al-Stone LLC*, 2013 N.Y. Misc. LEXIS 4725, at *8 (Sup. Ct. N.Y. Co. Oct. 17, 2013) (''Importantly, the courts have held that *Brill applies equally to court-imposed deadlines* as to the statutory deadline set forth in CPLR 3212(a)'')." In *Degaetano v. JP Morgan Chase Bank, N.A.*, the court held that the court's discretion in determining the existence of 'good cause' must be based upon a reason that is 'substantially related to the party's failure to file the motion within the 120-day period' rather than any excuses pertaining to the underlying merits of the motion itself.'' The *Degaetano* court emphatically noted that ''[w]hen a court determines that motions for summary judgment are to be made in a time period less than 120 days post note of issue filing, both motions and cross-motions made outside that time frame are not to be considered by the court.'' According to the court,''[m]otions for summary judgment submitted even one day beyond any court or statutorily imposed deadline should not be considered absent a showing of good cause, on the basis of the untimeliness . . . alone.'' 65 *Id.* (citing *Bevilacqua v. City of New York, 21 A.D.3d 340 (2d Dep't 2005); Milano v. George,* 17 A.D.3d 644 (2d Dep't 2005))." Even motions served only a day or two late require a showing of ''good cause.'' While courts are afforded wide latitude with respect to determining whether ''good cause'' exists, in the absence of such a showing, courts have no discretion to entertain even a meritorious untimely motion. Therefore, any late motion must be accompanied by a valid explanation for the delay." No 'good cause' excuse, or any excuse given by NYCTA. See also Defendant's own Notice to Pro Se Litigant(att.)which states, all in caps "THE CLAIMS YOU ASSERT IN YOUR COMPLAINT MAY BE DISMISSED WITHOUT A TRIAL IF YOU DO NOT RESPOND TO THIS MOTION **ON TIME**"[emphasis added]. And on second page "If you do not respond to the motion **on time**............"[emphasis added]. Perhaps the 'on time' requirement is for non-movants only. Petitioner speculates that Defendant will concoct some, like motion itself, day late and dollar short falsehood within Reply, *possibly with its new favorite* weapon/crime, i.e. S175.35 Offering a false instrument for filing in the first degree. If that is the case Petitioner respectfully requests the prospective opportunity to submit a scheduled sur-reply.

CRIMINAL CONDUCT

Plaintiff wishes to clarify to the Court (& TWIMC) that absolutely no joy, and certainly no benefit, is received for blowing the whistle on the all but uncounted 'hurricane' of criminality engaged in by NYCTA Department of Law. Again, where to start? How about the instant motion? First see again NYCTA Letter of January 24, 2017, (not January 23rd), i.e. doc. 39. Petitioner, in an attempt at comity, admittedly complimented NYCTA Counsel for merely not committing a felony. Apparently, this was too much to ask, or perhaps a siren call to perform the contrary action. Petitioner Requests leave (if necessary) to serve and file 'fully briefed' motion *in limine*, striking/barring *the second page of exhibit D, and all of Exhibits G and* H. With regards to H & G, both parties[3] and PERB have appeared for an 'Article 78' with regard to the arbitrary, capricious and lacking substantial evidence PERB Decision and 'Termination of Probation' Letter (Defendant's Exhibit F). PERB is arguing lack of 'personal and subject matter' jurisdiction (PERB has apparently conceded the PERB Decision was arbitrary capricious and lacking substantial evidence) and NYCTA

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[3] Index #101374-16 before the Honorable Justice *Arlene P. Bluth*, part 32. 80 Centre, Room 308 New York County Supreme Court.

(represented by Ms. Nolan) have been arguing that the issue of the retaliatory 'Termination from Probation' is solely before this body! The problem is that the retaliatory[4]'Termination of Probation' was (otherwise of retaliation) without pretext and thus by definition, and as a matter of fact and law[5], retaliatory/discriminatory for protected activity[6]. It is also arbitrary, capricious and lacking substantial evidence. Both arbitrary, capricious and lacking substantial evidence and additionally and separately retaliatory for protected activity involves both Title VII and 'Article 78' and both courts have separate jurisdiction and create this need for bifurcation. Article 78 cases cannot, and do not, involve adverse *job actions as retaliation for protected activity.*

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[4] Please see attached unanimous signed Workers Compensation Board Decision "**The instant matter involves a claimant that was the subject of a newspaper article that named him by name. The employer put the article up on its website and left it in the common area so that it was made available. The employer's own witness, the safety instructor, indicated that the way the article was made available for all to see could be considered harassment. The Board Panel finds that the claimant was exposed to stress greater than that which other similarly situated workers experienced in the normal work environment. Therefore the Board Panel finds, upon review of the record and based upon a preponderance of evidence, the claimant had an accident arising in and out of the course of employment.**" NYCTA chose to not include this definitive/dispositive finally decided (not appealed to Third Judicial Department) not-complied with Decision. Wonder why, slipped the mind? Petitioner believes there may be a need for a Third Amended Complaint, in order to comport with any new Order and to properly notice Defendant NYCTA of claims, incorporating WCB Decision on issues of fact regarding workplace harassment/defamation/hostile workplace, the ongoing predicate RICO wire/mail fraud, claims of intentional/negligent infliction of emotional distress, *etc.*

[5] **Reeves v. Sanderson Plumbing Products, Inc. 530 U.S. 133 (2000)"As the Court notes, it is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability. *Ante*, at 147. Under this commonsense principle, evidence suggesting that a defendant accused of illegal discrimination has chosen to give a false explanation for its actions gives**

rise to a rational inference that the defendant could be masking its actual, illegal motivation. *Ibid.* Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502 (1993). But the inference remains-unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, see *ante*, at 151, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above. Because the Court's opinion leaves room for such further elaboration in an appropriate case, I join it in full.

[6] Please see additional evidence within 04/04/17 EEOC Letter delineating previous 'Right to Sue Letter' predicate to the ongoing reign of harassment/retaliation/fraud/assault/defamation/infliction of emotional distress/false instruments, *etc.*.

retaliatory/discriminatory for protected activity. It is also arbitrary, capricious and lacking substantial evidence. Both arbitrary, capricious and lacking substantial evidence and additionally and separately retaliatory for protected activity involves both Title VII and 'Article 78' and both courts have separate jurisdiction and create the need for bifurcation. Article 78 cases cannot, and do not, involve adverse job actions as retaliation for protected activity.

rise to a rational inference that the defendant could be masking its actual, illegal motivation. Ibid. Whether the defendant was in fact motivated by discrimination is of course for the finder of fact to decide; that is the lesson of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). But the inference remains—unless it is conclusively demonstrated, by evidence the district court is required to credit on a motion for judgment as a matter of law, see ante, at 151, that discrimination could not have been the defendant's true motivation. If such conclusive demonstrations are (as I suspect) atypical, it follows that the ultimate question of liability ordinarily should not be taken from the jury once the plaintiff has introduced the two categories of evidence described above. Because the Court's opinion leaves room for such further elaboration in an appropriate case, I join it in full.

Please see additional evidence within 04/04/17 [illegible] letter outlining previous [illegible] precedents to the ongoing roles of harassment/retaliation/[illegible]/defamation/infliction of emotional distress/[illegible], etc.

Petitioner requests this Honorable Court, in an Order, clarify this to the NY Supreme Court that they are free to decide index #101374-16 as to the arbitrary, capricious and/or lacking substantial evidence standard[7] regarding the 'Termination from Probation'. Petitioner understands the Superior Court is staying any Decision pending that determination by this body due to misinformation/conflation by Ms. Nolan.

As to the 'decision[8]' by, allegedly, NY City Civil Service Commission; it was based solely on the, apparently solicited, false/forged instrument, i.e. Exhibit D, page 2 (page 1 is not a forged or false instrument). Petitioner has stated, under oath, that that document was never signed by Petitioner or even seen prior to December 5, 2016, its presumed creation date as a False Instrument in the first degree. Of course, the False/Forged Instrument lacks Consideration, Agreement, Performance, violates the *Contract, EDNY and Binding Contract Arbitrator* Precedents[9] and PRR 6.1.9[10], *etc.*. See also Personnel

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[7] Unless, of course, the EDNY is planning to, *sua sponte*?, take this 'Article 78' for the 'Termination of Probation' and/or PERB Decision on the basis of whether or not they were arbitrary, capricious and/or lacking substantial evidence. NYCTA has not submitted any motion or notice of removal to federal court.

[8] Petitioner attempted to verify if, in fact, this is an actual Decision of CSC and put in a call to CSC on that matter and received no reply of any kind. On information and belief, it appears to be actually a 'proposed decision', presumably by Ms. Nolan. There appears to be a great deal of *ex parte* activity between NYCTA and CSC, see, for example the admission by Ms. Petal Hwang of CSC of engaging in the same and even granting secret relief! There is the additional issue of, at least two, CSC Board Members who are former MTA Board Members. Given that Plaintiff has sued MTA/NYCTA (i.e., effectively, the MTA Board,)previously, they would be required to recuse themselves. There were also motions, including a motion to strike and motion

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in limine not acknowledged or addressed by CSC in any manor. Presumably still pending and unanswered by NYCTA.

[9] Please see & take Judicial Notice of **1:04-cv-02331-SLT-MDG** *Lewis v. New York City Transit Authority et al*, Document 209 pg 16-17 (att.)"The Transit Authority argues that Lewis' claims arising out of the Transit Authority's refusal to allow her to work as a station agent are barred by her failure to mitigate damages after the Transit Authority rescinded her reclassification to Station Agent on April 29, 2005 and subsequently terminated her from her position as a bus driver because she was medically disqualified from performing that job. (Def.'s Br. at 11.) This position is baffling in light of the Transit Authority's contention that Plaintiff was "employed" by the Transit Authority until her death. As the Transit Authority explains, "[b]ased upon a directive by Richard Adelman, the arbitrator in a related matter, the [June 14, 2005] termination of Ms. Lewis's employment was rescinded by letter, dated August 8, 2005; and until her death in 2012, Ms. Lewis remained in the title of bus operator at the [Transit Authority], although she

Services Bulletin 200-10 "The new provision states that employees serving permanently in a competitive, non-competitive, or labor class title who are covered by the Citywide Agreement and who work in an agency covered by the Personnel Rules and Regulations of the City of New York ("PRR")("covered employees") who are appointed to another position in the competitive, non-competitive, or labor class that requires serving a new *probationary period and in an agency covered by the* PRR, shall have the right to return to their former title and agency if they do not satisfactorily complete the new probationary period."" Upon receipt of their conditional resignation and request for a leave

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never again performed actual work at the [Transit Authority]." (Def.'s Br. at 7.) Since Lewis was "employed" by the Transit Authority, she had no obligation to mitigate her damages by seeking additional employment."

[10] PRR Rule 6.1.9, please see attached "C. Rights to Return to Former Position By accepting the change in title and regardless of whether a waiver is granted, the employee is considered to have resigned from the original title, and the appropriate agency must payroll the transfer and/or change of title. However, employees covered under PSB No. 200-10 who have not been granted a waiver will be granted a leave of absence for the duration of their probationary period in accordance with the procedures contained in that PSB."

pursuant to the procedures described herein, eligible employees shall be granted a Leave of Absence for the duration of the probationary period in the subsequent position. **Unlike many leaves of absence, there is no discretion on the part of the agency for granting this type of leave** [emphasis in original]….When an employee granted a leave pursuant to this PSB does not satisfactorily complete the probationary period in the *subsequent position, said employee shall be returned to* his/her former title and agency, provided said employee continues to meet the qualification and residence requirements applicable to his/her former title. If such requirements are met, **there is no discretion on the part of the former agency with respect to this matter** [emphasis in original]." The contract does not allow for probation for temporary medical reassignment (Section 2.16) and see Contract Arbitration Decision/Letter from Richard Adelman of August 8, 2005 quoted in *Lewis v NYCTA,* ***04-cv-02331*** **Memorandum & Order** doc 209 pg16-17; Plaintiff requests a copy of said document, in the possession of NYCTA, to be submitted to this Court and be made a part of the record, i.e. Discovery Request 1. Petitioner will be appealing this definitive arbitrary, capricious, and lacking substantial evidence anonymous 'decision' via another 'Article 78' and thus it is not finally decided and should not be used as it is subject to a likely *reversal. Nevertheless, note that the CSC acknowledge* in their one footnote that "the witness's name is unreadable" and further submit Affidavit from Mr. Smith showing that he does not know, or know who is, the alleged witness of the forged document, that he ever saw the document prior to December 5, 2017 (the actual creation date) and does not claim to be the witness to the forgery/creation.

FALSE INSTRUMENTS

Again, where to start? Petitioner is aware of, at least, three malicious, intentional False Instruments submitted by NYCTA to this body, CSC, WCB, IRS, PERB, *etc., etc.*.1) Please see the attached Decision by NYCTA Hearing Officer Bey. This knowingly False Instrument (in the first degree) was placed into evidence at the (ongoing) Workers Compensation Law 120 Hearing of the afternoon of September 28, 2017 by Counsel for NYCTA as an exhibit. Employers Exhibit B. Please see Decision by Unemployment Insurance Appeal Board (att.) page 2 pg6 "*The issue is the nearly two weeks of work he performed* during the first and second quarters of 2015, for which he did not receive his wages. The employer's witness produced time records reflecting the days that the claimant worked. She also conceded that the claimant had not received his pay check and had no explanation for why a check had not been issued to him[11]." i.e. **Fraud**, i.e. an intentional False Instrument submitted,

[11] The UIAB made an inadvertent error of fact, due to misinformation by NYCTA. Three weeks of vacation (actually 14 vacation and 1 personal leave day) accrued January 1, 2015 (not June 1), as per contract, and 12 sick days on May 1, 2015, again, as per contract. As per contract the 60 days of 60% sick pay were to be paid out after the regular sick days are exhausted.

and created by NYCTA for the sole purpose of Obstruction of Justice. NYCTA Manager Sunil Jacob testified at March 20, 2017 WCL 120 Hearing that he investigated and found that NYCTA has not paid the two weeks wages, 10 hours of overtime, 'waiver and election[12]'or 60 days (or any days) of 60% sick. He gave no explanation, i.e. not even a pretext, and acknowledged the total lack of precedent for this *ongoing criminal, intentional, conduct. If NYCTA does* not stipulate to Mr. Jacob's testimony/facts, Petitioner requests a copy of the certified March 28 transcript that NYCTA bought. 2) The fraudulent False Instrument (2016 W2, see redacted copy attached) submitted to the Internal Revenue Service, the New York

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[12] This is the required, by contact provision Section 2.17 page 65 paragraph B1 (att.)"An employee absent because of disability which he/she claims to be service-connected and who has accrued sick leave or vacation time will, on request, be granted eight hours pay for each work day absent beginning with the eleventh consecutive work day of absence. Such payments which will be made currently as a regular pay check, will be charged against the employee's accrued sick leave and vacation time, and will continue until such accrued time has been exhausted or until the employee returns to work whichever comes first." i.e. 15 vacation and 12 sick days.

State & City Tax Authorities, Plaintiff, *etc.*. This perfectly corrupt retaliatory harassment/fraud/false instrument is intended only to harm Petitioner for engaging in admitted protected activity! Petitioner has been paid a $50 uniform check in 2016 only[13] and has no idea how to file taxes with this fraudulent/false instrument forwarded to tax authorities! NYCTA river (or mountain?) of predicate civil RICO/Enterprise *Corruption acts admittedly read like a bad novel, but,* unfortunately, truth is stranger than fiction. And, again, NYCTA appears compelled, by/for retaliation alone, to perform these discrete acts of fiction/fraud/false instruments without constraint and demand that no remedy be made available and that they not be taken to account. NYCTA has taken the entirely well meaning, good faith, jurisdictional attempts by this court to simplify the Gordian knot of

[13] Petitioner additionally acknowledges two separate unemployment insurance claims were paid by NYS in 2015 and 2016 and that 30 days of 60% sick were paid in February 2015, late.

corruption/retaliation, in the interest of justice, the jury, the People and FRCP, by narrowing the admitted plethora of causes of action as absolution/legalization of their uncounted felonies[14]. 3) The false/forged instrument in exhibit E may actually be the most innocuous of the false instruments. While clearly an unlawful attempt to obstruct justice before various bodies by creating a secret, retroactive, illegal *'probation' for the involuntary transfer*[15]*, see also* Defendant's Exhibit C **Notice of Intent to Terminate, Eligibility for Reclassification**, actually signed and agreed to by Petitioner. First note that the document actually signed, page 1 of Defendant's Exhibit D, was signed on 03/11/2015 and does not mention probation,

[14] Petitioner acknowledges submitting a Second Amended Complaint with causes of action that appear to transcend Order. This is due strictly to the all but uncounted discreet concerted ongoing felony retaliation/adverse job actions committed after briefing of previous Motion(s) to Dismiss.

[15] Personnel Services Bulletin 200-6R "c. Involuntary Transfer - Functional Transfer or Transfer to Avoid Layoff; No new probationary period is required. However, a probationary employee is credited only for the period of time already served on probation and must complete the balance.

identically to Exhibit C. Apparently the implied suggestion is that I wandered back (where?) two days later and signed this ridiculous no consideration contract/precedent violating probation and resignation for no particular reason. Truly unbelievable. NYCTA never reported mythical 'probation' to DCAS[16], as required, *etc*..

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[16] From unacknowledged Motion to Quash False Instrument sworn Affidavit to Civil Service Commission "See also PSB 200-6R regarding C. Extension of the Probationary Period 1. "At least one month prior to the completion of the regular probationary period, the agency must notify the employee in writing that the employee's probationary period will be extended." Never happened, unless Ms. Nolan gets artistic again and offers an additional false instrument. 4. "Following this notice and consent, the agency must send a letter requesting the extension and stating the reasons therefor to the Control and Service Division immediately, but no less than two weeks before the extension begins. A copy of the employee's consent must be enclosed. The Control and Service Division will submit the request to the Deputy Commissioner for Citywide Personnel Services for approval." D. Termination Procedure "At the end or at any time after the minimum probationary period, the agency may terminate the employment of any unsatisfactory probationer by giving written notice of the termination to the employee and the Deputy Commissioner for Citywide Personnel Services." The Deputy Commissioner was not given written notice. Furthermore "Agencies may terminate the services of a probationer appointed from an open competitive list or of a labor class probationer after the two-month minimum probationary period by notifying, in writing, the probationer and the Payroll Audit Division of DCAS." DCAS was not notified. "Agencies may terminate the services of probationers appointed from promotion lists after

"FACTS ESTABLISHING THAT THE ACTS HE COMPLAINED OF WERE MOTIVATED BY A DISCRIMINATORY OR RETALIATORY PURPOSE"

NYCTA, in its conclusory, begging the question canard offer no pretext (see again *Reeves*) for their, admittedly, all but unbelievable, amount of criminal acts/retaliation, without precedent, performed in a concerted, intentional manor through present. Massive *unprecedented ongoing intentional Wage Theft/Wire/Mail*

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the four-month minimum probationary period by notifying, in writing, the probationer and the DCAS Payroll Audit Division." Again DCAS was not notified, as required, because there was no probation. Also PRR 5.2.7. Termination. (a) "At the end of the probationary term, the agency head may terminate the employment of any unsatisfactory probationer by notice to such probationer and to the commissioner of citywide administrative services." No notice to the Commissioner. If CSC reasonably finds it hard to believe that NYCTA would make up a document out of whole cloth Movant suggests review of attached "Step I" Decision that states "grievant was paid all pay requested within this grievance." This is an additional false instrument, directly contradicts the correct finding of fact by UIAB and is easily provable ongoing fraud by NYCTA. To be clear, there is no evidence I was paid illegally seized wages by NYCTA as I was not paid. If NYCTA had any evidence I was paid, other than their blithe, casual perjury, they would accuse me of the same fraud I am accusing them of. But there is silence as the predicate RICO felons are still working for NYCTA and collecting a salary, whereas I, who has done nothing wrong, am constructively, illegally and then actually terminated with an ex-post facto false "probation" and now another false instrument."

fraud, Assault, Defamation, Harassment, Forgery/False Instruments, Fraudulent Misrepresentation, Intentional/Negligent Infliction of Emotional Distress, continued Interference with Prospective Economic Advantage, Perjury, Obstruction of Justice, Enterprise Corruption, *etc., etc.*. NYCTA would prefer, and Demands, this Court stamp its imprimatur on their ongoing Predicate RICO felonies/moral hazard/attack on the *rule of law. Instead Petitioner requests, due* strictly to enumerated criminal activity/ongoing pretext-less adverse job actions/retaliation, that this well intentioned body that NYCTA has taken full advantage of, allow a Third Amended Complaint[17] adding back additional causes of action/counts, in the interest of Justice and Public Policy. Defendant speciously claims "The seven newly added paragraphs do

[17] Petitioner requests to be allowed to add NY Attorney General as Defendant/Required Party, in order to challenge the constitutionality of LL 190 under the Equal Protection Clause of the 14th Amendment. Petitioner does not believe an Authority (i.e. not an 'agency') was intended to be covered in this provision, as well.

not establish a causal connection the mistreatment plaintiff alleges that he suffered and a discriminatory or retaliatory motive." This is, of course, 'begging the question[18]', by simply stating as an implicit premise/conclusion that "do not establish a causal connection" is somehow self evident when nothing could be further from the truth! Defendant is attempting to legalize all retaliation/discrimination by suggesting *that no degree of pretext-less, otherwise unexplained,* concerted, deliberate, intentional, unprecedented criminal conduct, under color of law, could ever reach this perfectly undefined threshold. Does Defendant give an example of what would be, in their eyes, a 'causal connection' or for that matter 'conclusory' evidence that would meet this, certainly to Counsel, insurmountable burden? No, of course not, as it would show Petitioner has met his *prima facie* burden. Defendant, by Counsel, is attempting to hit a home run with a wiffle bat in order to legalize their own *criminal conduct and allow them to rob, terrorize,* assault, defame, and, most importantly and vitally, block from obtaining remedy and Seventh Amendment Rights this victim and, prospectively, victims to come.

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[18] **Description of Begging the Question** Begging the Question is a fallacy in which the premises include the claim that the conclusion is true or (directly or indirectly) assume that the conclusion is true. This sort of "reasoning" typically has the following form.

1. Premises in which the truth of the conclusion is claimed or the truth of the conclusion is assumed (either directly or indirectly).
2. Claim C (the conclusion) is true.

This sort of "reasoning" is fallacious because simply assuming that the conclusion is true (directly or indirectly) in the premises does not constitute evidence for that conclusion. Obviously, simply assuming a claim is true does not serve as evidence for that claim. This is especially clear in particularly blatant cases: "X is true. The evidence for this claim is that X is true."

MISSTATEMENTS & MISCHARACTERIZATIONS

NYCTA, in its relentless attempts to deliberately mislead this Court and other forums prefers to shy away from the truth. First see Document 23, NYP Holding's Motion to Dismiss & Reply to Opposition. In their MTD Memorandum Attachment 1 page 5 pg 2 "the article also referred to transit sources, in the article, who told the Post, among other things, that:......[the false, defamatory data]" and in attachment 9, Reply Brief, page 4 pg1, "Other purported errors that Burke cites represents the NYCTA's litigation position and background information provided by the NYCTA (for instance, that Burke was told to "quit or get off the gravy train"... that the switch from train operator to station agent was a demotion...[*etc.*}". While the proven *defamatory/harassing/injurious Libel*[19]*cannot be taxed* against the NY Post, it would be the only logical conclusion of a neutral jury[20], that NYCTA lied to the

[19] While the Court clearly stated that Section 74 applies to NYP Holdings, Inc. and Ms. Boniello, it is not at all clear that statute applies to an employer engaged in, as Petitioner has shown before the WCB, unconscionable harassment much greater than undergone by similarly situated Civil Servants.

[20] It is acknowledged that PERB has, in a perfectly mean spirited aside, suggested that Petitioner himself had given the outrageous, harmful, falsehoods to the Post. If that was the case, why would the Post not say so? The definitive arbitrary, capricious and lacking substantial evidence Decision. Instead the Post stated the Defamation was "NYCTA's litigation position", i.e. NYCTA Department of Law's doings. As far as treating similarly situated employees, and, in fact, other litigants, please see attached news articles stating "MTA(or NYCTA) does not comment on pending litigation", except in the instant case. Thus we have the definitive case of Retaliation

NY Post, in order to injure Plaintiff, and posted the same online and at workplace. While Petitioner, on information and belief, believes and informs that Ms. Nolan was the sole source of the defamatory retaliation, it cannot be verified definitively prior to Discovery. The 'information came from the NYCTA Department of Law, as stated by NY Post. If the incredibly bizarre, corrupt, foundationless conjecture *that the falsehoods came from Petitioner, we would have* to conclude that employees and NY Post Council conspired to frame NYCTA with the crime they, of course, committed. Perhaps Mr. Chiu, likely with some assistance with Ms. Nolan, conveyed the defamatory, injurious falsehoods to Ms. Boniello. That possibility would not absolve NYCTA of liability for their unconscionable, corrupt, concerted, intentional infliction of physical, and fiscal, ongoing injury of Plaintiff. Defendant is demanding this Court, and by

for Protected Activity, i.e. the filing of the instant, and previous Federal cases against Defendant.

construction, a jury, find and believe the impossible, that their concerted ongoing criminal activity/Retaliation **was done for no reason at all**! Was/is it random, This unprecedented corruption? The twin facts that Petitioner has the greatest degree of Protected Activity at NYCTA and the greatest degree of criminal retaliation are simply coincidence, we must otherwise conclude. Occam's Razor, and logic point to *the only, rational, possibility as to the genesis, and* motive for the unlawful, unprecedented adverse job actions, Retaliation for Protected Activity. No other construction, not even a pretext, has been proffered through today by NYCTA.

See also *Feliberty v. Kemper Corp.*, 98 F.3d 274, 277 (7th Cir.1996) (facts not disputed are deemed admitted). Petitioner respectfully Requests the following previously submitted enumerated undisputed facts be deemed admitted for the submitted Second

Amended Complaint and for necessary Oral Arguments, Discovery & Trial.

CONCLUSION

Petitioner Requests this Honorable Court Deny untimely Motion To Dismiss and Grant requested Relief, including Oral Arguments for instant motion and Discovery and Trial and for all other relief deemed *just and proper.*

*/S/*____________________

Brian Burke, Plaintiff, *pro se*

To, Daniel Chiu, *esq,*

New York City Transit Authority

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Law Week
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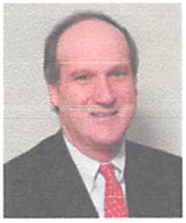
Civil Procedure

Summary Judgment

Even armed with winning arguments on the merits of a case, an attorney who misses the filing deadline for a summary judgment motion may find himself on the losing end of the matter, Phillips Nizer partner Bruce J. Turkle says. To avoid this predicament, he suggests that attorneys be aware of the deadline for filing the motion, take it seriously, and have a "good cause" explanation for the delay. Moreover, he says that "good cause" is a viable reason for the delay that objectively warrants avoiding the timeliness requirement.

The Case of the Untimely Summary Judgment Motion: The Mystery of What Constitutes 'Good Cause' for Missing the Deadline



Bruce J. Turkle

Stop me if you've heard this one: A lawyer walks into a courtroom with what he confidently believes is a slam dunk summary judgment motion. His adversary, who has failed to establish a material fact issue, tells the Court that the motion was served one week after the statutorily-imposed deadline. The lawyer shrugs off the delay, emphasizing the merits, the absence of prejudice, and that the interests of judicial economy would be served by granting his dispositive motion. The Court rejects the motion outright, leaving the dumbstruck lawyer to explain this troubling turn of events to his client.

The lawyer returns to his office to discover that a 1996 amendment to N.Y. C.P.L.R. 3212(a) sets forth a limitations period for a summary judgment motion.[1] He learns that under the statute, summary judgment motions must be made no later than 120 days after the filing of the note of issue, "except with leave of court on good cause shown."[2] Soon he has familiarized himself with the controlling case law and is dedicated to mak-

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[1] N.Y. C.P.L.R. 3212(a), as amended in 1996, states:

> Any party may move for summary judgment in any action, after issue has been joined; provided however, that the court may set a date after which no such motion may be made . . . . If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown.

Prior to the 1996 amendment, there was no statutory time limit for a summary judgment motion.

[2] *Brill v. City of New York*, 2 N.Y.3d 648, 651 (2004).

ing sure other lawyers know the perils of the untimely service of dispositive motions. These are the lessons he learned.

A. Take Deadline Seriously. A decade ago, the Court of Appeals in *Brill v. City of New York* warned that absent a showing of "good cause" for the delay in timely filing a motion for summary judgment, the Court will not consider such a motion on the merits and will instead decline to hear the motion outright.[3] *Brill* makes clear that the fact that the motion has merit, that summary judgment is in the interest of judicial economy, or that the opponent will not be prejudiced by the Court's consideration of the motion, shall not, absent a showing of "good cause," be sufficient grounds for the Court to hear such a motion.[4]

Miceli v. State Farm Mut. Auto. Ins. Co.,[5] decided a few months later, echoed *Brill* and "underscore[d]" the Court of Appeals' position that "statutory time frames (*see Kihl v. Pfeffer*)[6] like court-ordered time frames are not options, they are requirements, to be taken seriously by the parties."[7] The *Kihl* Court, in turn, emphasized that: "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity."[8]

More recently, a divided First Department in *Kershaw v. Hospital for Special Surgery*[9] recognized that "there may be situations where a meritorious summary judgment motion may be denied . . . ."[10] "However, the solution . . . is not for the courts to overlook or bend CPLR 3212(a) to fit the particular circumstances, but for 'practitioners [to] move for summary judgment within the prescribed time period or offer a legitimate reason for the delay.' In other words, *Brill* calls on the courts to lead by enforcing the words of the statute, rather than let attorney practice slowly eat away at the integrity of our judicial system."[11] Ultimately, " 'movants will develop a habit of compliance' with the statutory and court-ordered time frames, and late motions will include a good cause reason for the delay."[12]

B. 'Good Cause' Defined in Terms of Reason for Delay. *Brill* defined "good cause" to mean a satisfactory explanation for the untimeliness–rather than simply permitting meritorious, non-prejudicial filings, however tardy.[13] The *Miceli* Court observed that "good cause" is not defined by the merits of the motion: "if the merit of the motion itself constituted good cause, the statutory deadline would be circumvented and the practice of delaying such motions until the eve of trial encouraged."[14] "[I]n the wake of *Miceli* and *Brill*, parties may no longer rely on the merits of their cases to extricate themselves from failing to show good cause for a delay in moving for summary judgment pursuant to CPLR 3212(a)."[15]

In *Surace v. Lostrappo*,[16] a case pre-dating *Brill* and *Miceli*, "good cause" was defined as:

> a written expression or explanation by the party or his legal representative evincing a viable, credible reason for delay, which, when viewed objectively, warrants a departure or exception to the timeliness requirement.[17]

Courts are granted liberal latitude in deciding whether "good cause" has been shown, recognizing that "CPLR § 3212 [a] is not so unyielding as to require that an 'excellent' excuse be offered for the delay. There simply has to be 'satisfactory explanation for the untimeliness' and the court has considerable discretion in determining whether there is 'good cause' shown for a delay in the making of the motion."[18] "Thus, in deciding whether there is 'good cause' the court should not lose sight of why cases such as *Brill* and its progeny came to be. They were intended to stem the tide of '11th hour' motions for summary judgment which often disrupted calendars and delayed trials."[19]

Elsewhere, courts have stressed that the standard for a good cause showing should not be an unreasonable one and untimeliness should not be used as a facile excuse to avoid reaching the merits.[20] A party need not provide "an air tight, unassailable explanation."[21]

The lesson here is that what constitutes "good cause" has less to do with the merits of the actual motion and more to do with the reason for the untimeliness.[22] The Court is always within its discretion to hear a summary judgment motion regardless of the time delay in filing same.[23] The salient issue is always the nature of the excuse proffered for the delay.[24] As one court recently held, "the finding of good cause required to excuse the late filing of a motion for summary judgment must be found without reference to the merits of the motion, based solely upon the proffer of a satisfactory explanation for the delay."[25]

C. What Explanations Constitute 'Good Cause'? An attorney's illness has been found to be "good cause" for why a motion for summary judgment was made beyond 120 days.[26] Elsewhere, "good cause" was found where an attorney's medical crisis "affected his state of mind, causing him to miscalculate the due date [of his] mo-

[3] 2 N.Y.3d 648.
[4] *Id.*
[5] 3 N.Y.3d 725 (2004). *See Buckner v. City of New York*, 9 Misc.3d 510, 512 (Sup. Ct. N.Y. Co. 2005).
[6] 94 N.Y.2d 118 (1999).
[7] 3 N.Y.3d at 726-27.
[8] *Kihl v. Pfeffer*, *supra*, 94 N.Y.2d at 123.
[9] 978 N.Y.S.2d 13 (1st Dep't 2013).
[10] *Id.* at *19-20 (citing *Brill*, *supra*, 2 N.Y.3d at 653).
[11] *Id.*
[12] *Id.* (quoting *Brill*, *supra*, 2 N.Y.3d at 653).
[13] 2 N.Y.3d at 652.
[14] 3 N.Y.3d at 726.
[15] *Perini Corp. v. City of New York*, 16 A.D.3d 37, 38 (1st Dep't 2005).
[16] 176 Misc.2d 408, 410 (Sup. Ct. Nassau Co. 1998).
[17] *Id.*
[18] *Marton v. Con Edison*, 36 Misc.3d 1239(A), 964 N.Y.S.2d 60, 2012 N.Y. Misc. LEXIS 4321, at *2 (Sup. Ct. N.Y. Co. Sept. 4, 2012).
[19] *Id.* at *2-3.
[20] *Butt v. Bovis Lend Lease LMB, Inc.*, 47 A.D.3d 338 (1st Dep't 2007).
[21] *Maliqi v. 17 East 89th St. Tenants, Inc.*, 29 Misc.3d 1219(A), 897 N.Y.S.2d 670, 2008 N.Y. Misc. LEXIS 7484, at *9 (Sup. Ct. Bronx Co. Dec. 23, 2008).
[22] *Luciano v. Apple Maintenance & Services*, 289 A.D.2d 90, 90-91 (1st Dep't 2001).
[23] *Id.*
[24] *Id.*
[25] *Marino v. City of New York*, 40 Misc.3d 1227(A), 975 N.Y.S.2d 710, 2013 N.Y. Misc. LEXIS 3581, at *5 (Sup. Ct. Richmond Co. Aug. 2, 2013).
[26] *Perini Corp., v. City of New York*, 16 A.D.3d 37 (1st Dep't 2005).

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tion."[27] Family emergencies of a lawyer and his secretary constituted "good cause" in a case where the delay was *de minimis*.[28] The illness of an attorney's two children was likewise held to be "good cause."[29] In another matter, a family emergency, coupled with his partner's active participation for trial, constituted "good cause."[30] In one case, the "serious, life-threatening stress-related condition" of the defendant, as attested to by his physician, rendered it "beyond [defendant's] limit to work with his lawyers to draft an affidavit."[31]

However, in *Noboa-Jaquez v. Town Sports Int'l, LLC*,[32] defendant failed to show good cause for his late filing notwithstanding his having affirmed that he had a family emergency that forced him to be out of the office for five days before the deadline. The court stressed that "this accounts for only five days of the 60 days available to file the motion, and [defendant] made no attempt to contact the Court to request an extension."

Discovery-related issues have provided "good cause" for delays in making dispositive motions.[33] In *Butt v. Bovis Land Lease LMB, Inc.*, defendants satisfied their obligation to show "good cause" by explaining that the stenographer had lost her notes of the deposition of a key witness and the witness's deposition was not retaken until over four months after the note of issue had been filed.[34] In *Rodriguez v. Sequoia Prop. Mgmt. Corp.*,[35] the City of New York established "good cause" for its untimely cross-motion by showing that "despite its request for plaintiff's deposition testimony, which was necessary to make its cross motion, it has yet to receive a copy to date."[36]

Be warned, however, that courts have repeatedly held that the outstanding discovery must be relevant to the summary judgment motion.[37] In *Ramos v. Vornado N.Y. RR One LLC*, for example, an untimely cross-motion for summary judgment was denied since "[t]he testimony of the nonparty witness, whose deposition transcript the defendant was reportedly awaiting, was not relevant to the defendant's motion."[38] In *Van Dyke v. Skanska USA Civil Northeast, Inc.*, the grant of summary judgment was reversed, the Second Department finding that "[t]he discovery which the plaintiffs claimed was outstanding was not relevant to the plaintiffs' cross-motion, *inter alia*, for summary judgment and therefore was not a basis to establish good cause for the untimely cross-motion.[39] *See also, Jackson v. Jamaica First Parking, LLC*[40] ("[t]he record contains no proof that outstanding discovery prevented the appellant from making a timely motion for summary judgment"); *Greenpoint Props., Inc. v. Carter*[41] ("the discovery outstanding at the time the note of issue was filed was not essential to [the] motion").

In *Bongiorni v. 277 North LLC*,[42] the fact that "defendants merely sought to obtain a non-party deposition in conjunction with a misapprehension of the outside date for summary judgment motions [was] not sufficient to establish good cause . . . ."[43] "While Court ordered post-note of issue discovery can provide good cause to extend the time to move for summary judgment . . . the mere prospect of trying to obtain a non-party deposition that might support the motion after filing a note of issue is insufficient to establish good cause for a late summary judgment motion."[44]

D. Court-Imposed Deadlines Strictly Enforced. The vast majority of post-*Brill* cases hold that the "good cause" requirement applies both to motions made beyond the 120 days prescribed by CPLR 3212(a), and to shorter court-imposed time frames.[45] Thus, in *Drumgold v. AVA Service Corp.*,[46] the court, citing the 60-day rule prescribed by Kings County Supreme Court Uniform

[27] *Marton v. Con Edison*, supra, 2012 N.Y. Misc. LEXIS 4321, at *2.

[28] *Stimson v. E.M. Cahill Co.*, 8 A.D.3d 1004 (4th Dep't 2004).

[29] *Luciano v. Apple Maint. & Servs., Inc.*, 289 A.D.2d 90 (1st Dep't 2001).

[30] *Lambert v. Macy's East, Inc.*, 34 Misc.3d 1228(A) (Sup. Ct. Kings Co. 2010), *aff'd, in part*, 84 A.D.3d 744 (2d Dep't 2011).

[31] *Kaplan v. Khan*, 31 Misc.3d 1227(A), 2011 N.Y. Misc. LEXIS 2294, at *2 (Sup. Ct. Kings Co. May 17, 2011).

[32] 2012 N.Y. Misc. LEXIS 2480, at *4 (Sup. Ct. N.Y. Co. May 21, 2012).

[33] *See, e.g., Kunz v. Gleeson*, 9 A.D.3d 480 (2d Dep't 2004); *Pena v. Women's Outreach Network*, 35 A.D.3d 104 (2d Dep't 2006).

[34] 47 A.D.3d 338, 339-40 (1st Dep't 2007).

[35] 24 Misc.3d 822, 824 (Sup. Ct. Queens Co. 2009).

[36] *Id.*

[37] *See Anderson v. Kantares*, 51 A.D.3d 954, 954 (2d Dep't 2008); *Stewart v. Perez*, 35 Misc.3d 1241(A) (Sup. Ct. Queens Co. June 14, 2012).

[38] 2011 N.Y. Misc. LEXIS 784, at *16 (Sup. Ct. Queens Co. Mar. 1, 2011) (citations omitted).

[39] 83 A.D.3d 1049, 1049-50 (2d Dep't 2011) (citations omitted).

[40] 49 A.D.3d 501, 501 (2d Dep't 2008) (citing *Espejo v. Hiro Real Estate Co.*, 19 A.D.3d 366 (2d Dep't 2005)).

[41] 82 A.D.3d 1157, 1158 (2d Dep't 2011).

[42] 2013 N.Y. Misc. LEXIS 3290, at *2 (Sup. Ct. N.Y. Co. July 18, 2013)

[43] *Id.*, at *2-3 (citing *cf. Azcona v. Salem, supra*, 49 A.D.3d 343) ("the legislatively imposed deadline for filing summary judgment motions must be strictly followed, and courts may not excuse a late motion, no matter how meritorious, upon a perfunctory claim of law office failure") (citation omitted).

[44] *Id.*, at *3-4 (citing *Pena v. Women's Outreach Network, Inc.*, 35 A.D.3d 104, 108-09 (1st Dep't 2006); *cf. Brown v. City of New York*, 22 Misc.3d 893, 897-98 (Sup. Ct. N.Y. Co. 2008) ("The reference to taking of non-party depositions post-note of issue, fails to specify dates or identify the witnesses and does not establish any connection between the factual content of the depositions and the delay in bringing the summary judgment motion"); *Neil v. New York City Hous. Auth.*, 15 Misc.3d 1115(A), 2007 N.Y. Misc. LEXIS 1763, at *16 (Sup. Ct. Kings Co. Apr. 4, 2007) ("[t]he fact that Ms. Belnavis's non-party deposition occurred after the filing of the Note of Issue does not excuse the City for failing to bring the summary judgment motion for more than 120 days after the completion of the deposition"), *aff'd*, 48 A.D.3d 767 (2d Dep't 2008).

[45] *Bevilacqua v. City of New York*, 21 A.D.3d 340 (2d Dep't 2005); *Milano v. George*, 17 A.D.3d 644 (2d Dep't 2005); *Cabibel v. XYZ Associates, L.P.*, 36 A.D.3d 498 (1st Dep't 2007); *Mizell v. Eastman & Bixby Redevelopment Co., LLC*, 34 A.D.3d 770 (2d Dep't 2006). *See also, Tucci v. Colella*, 26 Misc.3d 1234(A), 907 N.Y.S.2d 441, 441 (Sup. Ct. Kings Co. 2010) ("Second Department post *Brill* and *Miceli* decisions continue to hold movants to CPLR Rule 3212(a) time limits, or shorter periods if set by the courts, such as in Kings County Supreme Court Uniform Civil Term Rule 13 or the successor Rule C(6)."); *Perez v. Al-Stone LLC*, 2013 N.Y. Misc. LEXIS 4725, at *8 (Sup. Ct. N.Y. Co. Oct. 17, 2013) ("Importantly, the courts have held that *Brill* applies equally to court-imposed deadlines as to the statutory deadline set forth in CPLR 3212(a)").

[46] 37 Misc.3d 1212(A), 2012 N.Y. Misc. LEXIS 4997 (Sup. Ct. Kings. Co. Oct. 22, 2012).

Civil Term C(6), held that "without any good cause shown for an extension for making a summary judgment motion cannot extend the deadline for a summary judgment motion."[47] In so holding, the court cited the prior year's decision in *Bivona v. Bob's Discount Furniture of NY, LLC*,[48] which harkened back to *Brill* in instructing that "[i]n the absence of a showing of good cause for the delay in filing a motion for summary judgment, 'the court has no discretion to entertain even a meritorious, nonprejudicial motion for summary judgment.' "[49]

Lawyers should be wary of relying on the few decisions which seemingly take a different approach towards court-imposed deadlines. In *Hernandez v. 620 West 189th Limited Partnership*, the court questioned whether it was constrained by *Brill* to reject a summary judgment motion filed after the 60 days imposed by court rule. The court held that it was not so constrained, stressing that "the court is specifically required to be flexible. The 60-day requirement was promulgated by the Supreme Court, New York County, as a case management tool for the judge."[50] In the court's view:

> this court is willing to pay the price of "rigidity" if it means adherence to its obligations to honor a clear legislative policy determination in enacting CPLR 3212(a). No such legislative intent, however, exists with respect to the 60-day requirement; it is court imposed. And this court has the discretion to "cut to the chase," as Professor Siegel suggests, as long as the exercise of such broad, but not unbridled, discretion does not exceed the legislative ceiling of 120 days.[51]

The *Hernandez* court concluded that:

> courts have the discretion to disregard a self-imposed deadline for filing a summary judgment motion to "accommodate a genuine need." This "genuine need," however, does not mean "good cause" as contemplated by CPLR 3212(a), and it may include entertaining the merits of a belated motion filed within the 120-day ceiling and, consistent with a court's traditional exercise of discretion, the absence of prejudice to the party opposing the belated motion.[52]

Hernandez was cited approvingly by the court in *Fitzsimons v. Fradella*,[53] which, after discussing *Brill*, noted that "local Nassau Court rules shorten this [120-day] deadline to 60 days after the filing of the Note of Issue."[54] The court held that "[w]hen local court rules promulgated the Supreme Court shorten the deadline [to 60 days] as a case management tool, 'courts have the discretion to disregard a self-imposed deadline for filing a summary judgment motion to accommodate a genuine need.' "[55] The court found "genuine need" and "good cause" in the fact that "there is discovery outstanding since the filing of the Note of Issue," stressing that such discovery constitutes "good cause" "when this late discovery is germane to the party's motion."[56]

E. If Motion Is Untimely, Say Something. *Brill* made clear that "[n]o excuse at all, or a perfunctory excuse, cannot be 'good cause.' "[57] Courts have consistently rejected untimely summary judgment motions where the movant failed to offer any excuse.[58] In *Harrington v. Palmer Mobile Homes, Inc.*,[59] for example, defendant's summary judgment motion was rejected since it was "served without leave or explanation well after the deadlines established more than six months earlier."[60] Moreover, defendant made no "attempt to establish good cause for the delay."[61]

The lawyer's excuse for late service must relate to the motion. In *Degaetano v. JP Morgan Chase Bank, N.A.*,[62] the court held that the court's discretion in determining the existence of 'good cause' must be based upon a reason that is 'substantially related to the party's failure to file the motion within the 120-day period' rather than any excuses pertaining to the underlying merits of the motion itself."[63] The *Degaetano* court emphatically noted that "[w]hen a court determines that motions for summary judgment are to be made in a time period less than 120 days post note of issue filing, both motions and cross-motions made outside that time frame are not to be considered by the court."[64] According to the court, "[m]otions for summary judgment submitted even one day beyond any court or statutorily imposed deadline should not be considered absent a

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[47] *Id.*, at *3.
[48] 90 A.D.3d 796, 796 (2d Dep't 2011).
[49] *Id.* (citing *Greenpoint Props., Inc. v. Carter*, 82 A.D.3d 1157, 1158 (2d Dep't 2011) (quoting *John P. Krupski & Bros., Inc. v. Town Bd. of Southold*, 54 A.D.3d 899, 901 (2d Dep't 2008) (and citing *Brill*, *supra*, 2 N.Y.3d at 652). See *First Union Auto Finance, Inc. v. Donat*,16 A.D.3d 272 (2d Dep't 2005); *Dettmann v. Page*, 18 A.D.3d 422 (2d Dep't 2005).
[50] 7 Misc.3d 198, 200 (Sup. Ct. N.Y. Co. 2005).
[51] *Id.*
[52] Id. at 200-01. The *Hernandez* court further held that "[o]f course, 'good cause' may also be a genuine need." (citing *Kunz v. Gleeson*, 9 A.D.3d 480 (2d Dep't 2004) (Court held that lower court providently exercised its discretion in entertaining defendant's motion for summary judgment made about two weeks beyond the deadline fixed by the court because defendant demonstrated good cause).
[53] 2011 N.Y. Misc. LEXIS 1515 (Sup. Ct. N.Y. Co. Mar. 30, 2011).
[54] *Id.*, at *11.
[55] *Id.* (quoting *Hernandez v. 620 West 189th Ltd. Partnership*, 7 Misc.3d 198 (Sup. Ct. N.Y. Co. 2005)).
[56] *Id.*, at *12.
[57] 2 N.Y.3d at 652.
[58] *See Long v. Children's Village, Inc.*, 24 A.D.3d 518, 519 (2d Dep't 2005) ("[motion] made some 17 months after the note of issue was filed, and the defendant made no explanation for the delay . . .") (citations omitted); *Levy v. Deer Trans. Corp.*, 27 A.D.3d 279, 279 (1st Dep't 2006) (untimely summary judgment motion rejected, movant "provided no explanation for her delay."); *Jones v. Ratzel*, 40 A.D.3d 936, 936-37 (1st Dep't 2007) (to the same effect); *Moore v. Benowitz*, 2011 N.Y. Misc. LEXIS 6666 (Sup. Ct. Suffolk Co. Dec. 19, 2011); *Maury v. County of Suffolk*, 2007 N.Y. Slip Op 31366 (U) (Sup. Ct. Suffolk Co. May 21, 2007) (cross-motion for summary judgment rejected where "[p]laintiff's counsel has provided no explanation or 'good cause' for serving the cross-motion 37 days late, and thus, the Court has no discretion to entertain it on the merits") (citations omitted); *Soltes v. 260 Waverly Owners, Inc.*, 42 A.D.3d 565, 565-66 (2d Dep't 2007) (grant of summary judgment reversed where there was no good cause alleged for the untimely filing of the summary judgment motion).
[59] 71 A.D.3d 1274, 1275 (3d Dep't 2010).
[60] Id.
[61] *Id.* at 1275 (citing, *Brill*, *supra*, 2 N.Y.3d at 652; and *Coty v. County of Clinton*, 42 A.D.3d 612, 614 (3d Dep't 2007)).
[62] 39 Misc.3d 1211(A), 2013 N.Y. Misc. LEXIS 1486 (Sup. Ct. Orange Co. Mar. 15, 2013).
[63] *Id.*, at *33 (quoting *John v. Bastien*, 178 Misc.2d 664, 667 (Civ. Ct. Kings Co. 1998)).
[64] *Id.*, at *34 (quoting *First Union Auto Finance v. Donat*, 16 A.D.3d 372 (2d Dep't 2005)).

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showing of good cause, on the basis of the untimeliness . . . alone."[65]

F. Untimely Cross-Motion Might Be Considered. An exception to the "good cause" requirement authorizes the court to consider a belated application for summary judgment when the same is made in response to still pending motions for summary judgment and when the belated cross-motion seeks relief on the very issues raised by the timely motions.[66] The threshold issue is not whether the same relief is sought, but whether the same arguments are made and more importantly whether the same issues are addressed.[67] "An otherwise untimely cross motion may be made and adjudicated because a court, in the course of deciding the timely motion, may search the record and grant summary judgment to any party without the necessity of a cross motion."[68]

Where the issues are not intertwined or nearly identical, the untimely cross-motion will be denied.[69] "Mere similarity . . . will not suffice."[70]

[65] *Id.* (citing *Bevilacqua v. City of New York*, 21 A.D.3d 340 (2d Dep't 2005); *Milano v. George*, 17 A.D.3d 644 (2d Dep't 2005)).

[66] *See Filannino v. Triborough Bridge and Tunnel Auth.*, 34 A.D.3d 280 (1st Dep't 2006), *appeal dismissed*, 9 N.Y.3d 862 (2007); *Altschuler v. Gramatan Management, Inc.*, 27 A.D.3d 304 (1st Dep't 2006); *Bressingham v. Jamaica Hosp. Med. Ctr.*, 17 A.D.3d 496 (2d Dep't 2005).

[67] *See Filannino v. Triborough Bridge and Tunnel Auth., supra*, 34 A.D.3d 280; *Altschuler v. Gramatan Management, Inc., supra*, 27 A.D.3d 304; *Braunstein v. Half Hollow Hills Cent. School Dist.*, 104 A.D.3d 893, 894 (2nd Dep't 2013); *Grande v. Peteroy*, 39 A.D.3d 590, 591-92 (2d Dep't 2007).

[68] *Filannino v. Triborough Bridge & Tunnel Auth., supra*, 34 A.D.3d at 281 (citing CPLR 3212(b)). *See Alexander v. Gordon*, 95 A.D.3d 1245, 1247 (2d Dep't 2012) ("because the defendants made a timely motion for summary judgment . . . on the ground that the injured plaintiff did not sustain a serious injury . . . that branch of plaintiffs' cross-motion . . . on the issue of serious injury can be entertained") (citations omitted).

[69] See *Miller v. New York City Hous. Auth.*, 2010 N.Y. Misc. LEXIS 1592, at *31 (Sup. Ct. Kings Co. Mar. 22, 2010) (court declined to consider untimely cross-motion since they were "not identical to those claims raised in plaintiff's motion for summary judgment.") (citations omitted).

[70] *Colavita v. MTA Long Island Railroad*, 2008 N.Y. Misc. LEXIS 9245, at *4 (Sup. Ct. Nassau Co., May 30, 2008) citing, *inter alia*, *Bickelman v. Herrill Bowling Corp.*, 49 A.D.3d 578, 580 (2d Dep't 2008).

G. Lessons Learned. First and foremost, lawyers must be aware that deadlines exist for moving for summary judgment. Moreover, it is not enough that lawyers know, generally, of the 120-day deadline proscribed by CPLR 3212(a); particular courts and individual judges often impose shorter deadlines. Court imposed deadlines are ignored at movant's peril; motions for summary judgment filed after such deadlines will be rejected even if the summary judgment is brought within 120 days of the filing of the note of issue.

Even motions served only a day or two late require a showing of "good cause." While courts are afforded wide latitude with respect to determining whether "good cause" exists, in the absence of such a showing, courts have no discretion to entertain even a meritorious untimely motion. Therefore, any late motion must be accompanied by a valid explanation for the delay.

Lawyers can be undone by their silence. Failing to explain the reason for the delay, or providing a perfunctory response, can be fatal. Once aware of the possibility that a dispositive motion might be served late, alert the Court and seek an extension. Common sense dictates that judges will be more tolerant of a lawyer who acts pro-actively, pre-deadline, rather than waiting until the deadline has expired to try to establish "good cause" for the delay. Likewise, if any ambiguity exists with regard to the interplay between the dates set forth in a preliminary conference order and CPLR 3212(a) and/or the local rules of the court, seek clarification at the earliest possible time.

If the deadline has passed, focus your response on the reason for the delay. Devoting space to the merits or the absence of prejudice or judicial economy is, under *Brill* and its progeny, a waste of words. Regardless of the strength of your legal arguments, the court will not reach the merits if it finds an absence of "good cause" for the delay. You must first get over the timeliness hurdle.

Finally, detail the reason for the delay. If the delay relates to outstanding discovery, demonstrate that the discovery is germane to the motion. If the delay relates to confusion concerning scheduling, provide the court with communications reflecting an ambiguity, or your attempt to obtain clarification. Regardless of the reason for the delay, offer a full explanation complete with any relevant documentation. Remember, again, that unless the movant can establish "good cause" for the untimely motion, the court will not address the merits; accordingly, every effort should be made to convince the court to exercise its discretion and excuse the late filing.

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Sorting Complete	NEW YORK, NY 10010	March 7, 2017 9:00 am	
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Updated Delivery Date: March 7, 2017

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Out for Delivery	NEW YORK, NY 10010	March 7, 2017 6:10 am	
Sorting Complete	NEW YORK, NY 10010	March 7, 2017 6:00 am	
Arrived at Post Office	NEW YORK, NY 10010	March 7, 2017 5:31 am	
Shipment Picked Up	BROOKLYN, NY 112[illegible]	March 6, 2017 4:37 pm	

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130 Livingston Street
Brooklyn, NY 11201

Veronique Hakim
President

MTA New York City Transit
(718) 694-3686

January 24, 2017

Via Electronic Case Filing
Honorable Eric N. Vitaliano
United States District Judge
United States District Court
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Burke v. New York City Transit Authority, *et al.*
Docket No. 15 CV 1481 (ENV)(LB)

Dear Judge Vitaliano:

This office represents defendants New York City Transit Authority ("NYCT"), Kristen Nolan, and Leonard Akselrod (collectively, "Defendants") in the above referenced action.

This letter is submitted in response to the Court's Order, dated January 24, 2017, and to inform the Court that after I prepared and mailed Defendants' January 23, 2017 letter to establish a briefing schedule for Defendants' motion to dismiss, I received the attached e-mail from plaintiff Brian Burke, *pro se*.

In the e-mail, plaintiff requested six weeks, or until April 14, 2017, to respond to Defendants' motion. As a result, the revised briefing schedule would be:

March 3, 2017 – defendants' motion to dismiss
April 14, 2017 – plaintiff's opposition
April 28, 2017 – defendants' reply

Based on the foregoing, Defendants respectfully requests that the Court approve the briefing schedule proposed above.

Thank you for your consideration of this request.

Respectfully submitted,

Daniel Chiu

cc: Brian Burke, *pro se* (via First-Class Mail)

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Chair

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WORKERS' COMPENSATION BOARD
PO BOX 5205
BINGHAMTON, NY 13902
www.wcb.ny.gov

State of New York - Workers' Compensation Board

In regard to BRIAN T BURKE, WCB Case #G127 8038

MEMORANDUM OF BOARD PANEL DECISION

keep for your records

Opinion By: Loren D. Lobban
Mark R. Stasko
Mark D. Higgins

The self-insured employer (SIE) requests administrative review of the Workers' Compensation Law Judge (WCLJ) decision filed on November 30, 2015. The claimant timely filed a rebuttal.

ISSUE

The issue presented for administrative review is whether the claimant had an accident arising in and out of the course of employment.

FACTS

This is a controverted claim for a panic attack, centered on an unflattering New York Post article naming the claimant.

The claimant started training for a position as a station agent on March 22, 2015. On March 29, 2015, the New York Post wrote an article about the claimant and his lawsuits with the employer Metropolitan Transit Authority (MTA).

The claimant testified at length about how the article was posted in areas where the employees saw it and talked to him about the article. This constant dealing with the article lead to a panic

**** Continued on next page ****

Claimant -	BRIAN T BURKE	Employer -	New York City Transit Authorit
Social Security No. -		Carrier -	NYC Transit Authority
WCB Case No. -	G127 8038	Carrier ID No. -	W848006
Date of Accident -	04/06/2015	Carrier Case No. -	TA201500704
District Office -	NYC	Date of Filing of this Decision–	02/06/2017

ATENCION:
Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

W16-C096

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
PO BOX 5205
BINGHAMTON NY 13902
www.wcb.ny.gov

Kenneth J. Munnelly
Chair

State of New York - Workers' Compensation Board

In regard to BRIAN T BURKE, WCB Case #G127 5058

MEMORANDUM OF BOARD PANEL DECISION

Opinion By: Loren D. Lobban
Mark R. Stasko
Mark D. Higgins

The self-insured employer (SIE) requests administrative review of the Workers' Compensation Law Judge (WCLJ) decision filed on November 30, 2015. The claimant timely filed a rebuttal.

ISSUE

The issue presented for administrative review is whether the claimant had an accident arising in and out of the course of employment.

FACTS

This is a controverted claim for a panic attack centered on an unflattering New York Post article naming the claimant.

The claimant started training for a position as a station agent on March 24, 2014. On March 19, 2015, the New York Post wrote an article about the claimant and his lawsuits with the employer Metropolitan Transit Authority (MTA).

The claimant testified at hearing about how the article was posted in areas where the employees saw it and talked to him about the article. This constant ridiculing with the article lead to a panic

*** Continued on next page ***

Claimant -	BRIAN T BURKE	Employer -	New York City Transit Authority
Social Security No. -		Carrier -	NYC Transit Authority
WCB Case No. -	G127 5058	Carrier ID No. -	W548-06
Date of Accident -	[illegible]	Carrier Case No. -	TA2015-0703
District Office -	NYC	Date of Filing of this Decision -	[illegible]

ATENCIÓN:
Puede llamar a la oficina de la Junta de Compensación Obrera y solicitar que le proporcionen un intérprete gratuitamente que le ayude a ponerse en contacto con usted. Mientras tanto, la información relacionada a su reclamo de compensación obrera.

RB-1 (4/08)
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attack on April 6, 2015.

Dr. Sherman, the claimant's treating psychologist, in a report dated May 5, 2015, indicating the claimant had a panic attack signifying that he could not handle the stress of going back to work. The claimant gave a history that an article was written about him and on April 6, 2015, he was going to training as a station agent and had a panic attack because people were asking him about the article. He reports it was an accumulation from insults of the prior week. The claimant has treated with Dr. Sherman in the past. The panic attacks he is currently experiencing, however, are directly related to his return to work as a station agent trainee and the situation which has arisen at his job.

Dr. Miskin, the SIE's consultant, in his report dated October 2, 2015, diagnosed the claimant with panic disorder without agoraphobia. Dr. Miskin states that there appears to be a consequential causal relationship between the incident date of April 6, 2015, and purported psychiatric symptoms.

The supervisor testified that he was called down to where the claimant was on the date of the incident and when he came to the claimant the claimant said he wanted to file a report of injury. *The supervisor testified that the newspaper article was on the MTA website.*
The safety instructor testified that he saw the claimant on the date of the incident and the claimant indicated he was having anxiety but declined treatment. He stated that this posting of the article could be distressing and harassment.

By decision filed on November 30, 2015, the WCLJ found the claimant had a work related panic disorder. The claimant's average weekly wage was set at $1,761.62 without prejudice. Awards were made for the period April 7, 2015, to July 13, 2015, at the temporary total disability rate of *$808.65 per week, July 13, 2015, to November 12, 2015, no medical evidence.*

LEGAL ANALYSIS

The SIE argues that the claimant had ongoing psychiatric issues and any occurrence was from a prior condition. Additionally, a newspaper article appears to be the cause of the claimant's condition and the employer is not responsible for the newspaper article. There was no evidence that the co-workers or the supervisor harassed him over the article. The claimant worked the entire week of March 30, 2015, without psychological incident. It is not evident that the newspaper article was the cause of the panic disorder, or that it was caused by his employment. This claim must be dismissed.

*** *Continued on next page* ***

Claimant -	BRIAN T BURKE	Employer -	New York City Transit Authorit
Social Security No. -		Carrier -	NYC Transit Authority
WCB Case No. -	G127 8038	Carrier ID No. -	W848006
Date of Accident -	04/06/2015	Carrier Case No. -	TA201500704
District Office -	NYC	Date of Filing of this Decision– 02/06/2017	

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The claimant argues that the newspaper article was put up on the bulletin board and on the website so that all employees were aware of it. This led to a great embarrassment and it is because of the fact that it was purposely made available, that the employer is responsible. The claimant credibly testified to the incident. The SIE's consultant opined that the incident was causally related. The claimant's doctor documented the diagnosis and that it was causally related. Therefore the decision was proper and should not be disturbed.

"[A] mental injury precipitated solely by psychic trauma may be compensable in workers' compensation" *(Matter of Guess v Finger Lakes Ambulance*, 28 AD3d 996 [2006], *lv denied* 7 NY3d 707 [2006] [citations omitted]). "[A] claim for work-related stress cannot be sustained absent a showing that the stress experienced by the affected claimant was greater than that which other similarly situated workers experienced in the normal work environment" (*Matter of Spencer v Time Warner Cable*, 278 AD2d 622 [2000], *lv denied* 96 NY2d 706 [2001] [citations omitted]). "This inquiry . . . presents a factual issue for the Board to resolve and its determination, if supported by substantial evidence in the record as a whole, will not be disturbed" (*Matter of Kopec v Dormitory Auth. of State of N.Y.*, 44 AD3d 1230 [2007] [citation omitted]).

The instant matter involves a claimant that was the subject of a newspaper article that named him by name. The employer put the article up on its website and left it in common areas so that it was made available. The employer's own witness, the safety instructor, indicated that the way the article was made available for all to see could be considered harassment. The Board Panel finds that the claimant was exposed to stress greater than that which other similarly situated workers experienced in the normal work environment.

Therefore the Board Panel finds, upon review of the record and based upon a preponderance of the evidence, the claimant had an accident arising in and out of the course of employment.

CONCLUSION

**** Continued on next page ****

Claimant -	BRIAN T BURKE	Employer -	New York City Transit Authorit
Social Security No. -		Carrier -	NYC Transit Authority
WCB Case No. -	G127 8038	Carrier ID No. -	W848006
Date of Accident -	04/06/2015	Carrier Case No. -	TA201500704
District Office -	NYC	Date of Filing of this Decision– 02/06/2017	

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ACCORDINGLY, the WCLJ decision filed on November 30, 2015, is AFFIRMED. No further action is planned at this time.

All concur.

Loren D. Lobban | Mark R. Stasko | Mark D. Higgins

Interest is due to the claimant on the unpaid portion of the award, if any, pursuant to WCL section 20 or DBL section 221. However, interest is not due on any portion of the award rendered as a credit or reimbursement to an employer for compensation already paid, unless the claimant's leave credits have value and have not been fully restored pursuant to a collective *bargaining agreement.*

Pursuant to the provisions of § 142(5) of the Workers' Compensation Law, NYC Transit Authority is assessed the sum of $150.00.

Payment of assessment must be made within 30 days. Make check payable to: ""Chair, Workers' Compensation Board"" and forward with a copy of this notice to the Workers' *Compensation Board, Attention: Finance Unit, 328 State Street, Schenectady NY 12305-2318.* If an appeal is taken to the Appellate Division of the Supreme Court, send a copy of the appeal to the Finance Unit. Please include the reference number 22375094 with your payment to ensure proper credit.

Claimant -	BRIAN T BURKE	Employer -	New York City Transit Authorit
Social Security No. -		Carrier -	NYC Transit Authority
WCB Case No. -	G127 8038	Carrier ID No. -	W848006
Date of Accident -	04/06/2015	Carrier Case No. -	TA201500704
District Office -	NYC	Date of Filing of this Decision– 02/06/2017	

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

ACCORDINGLY, the WCLJ decision filed on November 30, 2015, is AFFIRMED. No further action is planned at this time.

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Mark D. Higgins Mark R. Stasko Loren D. Lobban

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Claimant -	BRIAN F [illegible]	Employer -	New York City Transit Authority
Social Security No. -		Carrier -	NYC Transit Authority
WCB Case No. -	G127 8038	Carrier ID No. -	W448006
Date of Accident -	04/06/2015	Carrier Case No. -	1A40150704H
District Office -	NYC	Date of Filing of this Decision -	02/09/2017

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EC 1081.1 (4/09)
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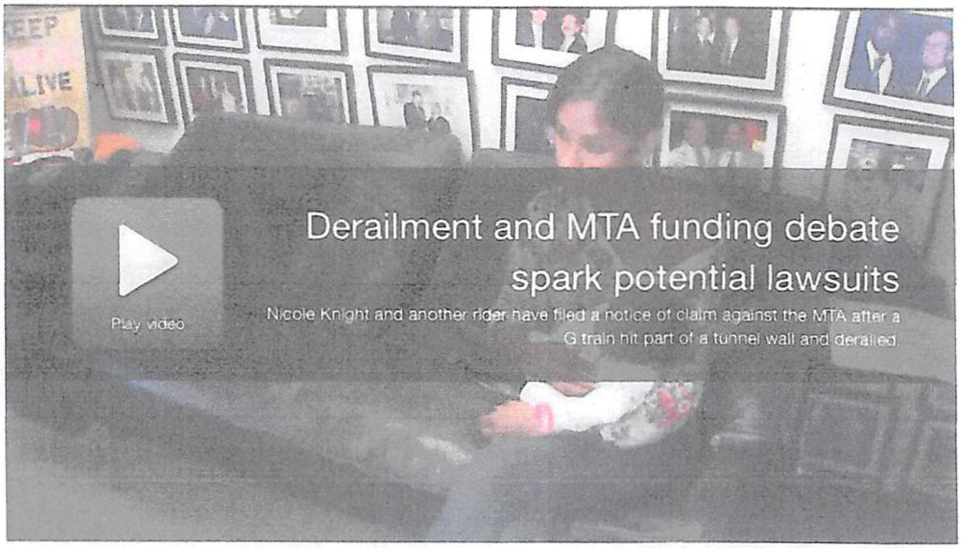
Riders plan lawsuits because of G Train derailment and MTA conditions

POSTED 8:40 PM, OCTOBER 5, 2015, BY GREG MOCKER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Derailment and MTA funding debate spark potential lawsuits
Nicole Knight and another rider have filed a notice of claim against the MTA after a G train hit part of a tunnel wall and derailed

Two riders say they will sue the MTA after experiencing the G train derailment on the evening of Sept 10, 2015 near the Hoyt-Schermerhorn station in downtown Brooklyn.

Two wheels from the first car came off the tracks after the train struck part of a tunnel wall that had become dislodged.

Along with Attorney Sanford Rubenstein, they're also calling into question the conditions in the system.

A "Notice of Claim" was filed against the MTA for personal and permanent injuries and pain and suffering. According to paperwork, each one is seeking $2 million.

Neither the MTA nor the NYC Law Department will comment on pending litigation.

There is a lot of back and forth between elected officials about who's going to cover about $3 billion in costs for the upcoming Capital Plan, which covers maintenance and improvement projects.

TIMES Ledger
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March 5, 2009 / News / Astoria Times

LIC subway rape victim files suit against MTA

By Nathan Duke

The attorney for a Brooklyn woman who was raped four years ago on a Long Island City subway platform said the city Transit Authority and two of its employees should pay for failing to protect the victim as she pleaded for help.

Maria Besedina, 25, was sexually assaulted around 2 a.m. by a man on the subway platform of the G line at Long Island City's 21st Street station in June 2005. The rapist, who was never apprehended, had sat down next to the victim on an empty subway train and touched her leg, attorney Marc Albert said.

Besedina confronted the man and left the train, but the assailant began licking her foot and ankle once she was on the platform, Albert said. She ran toward a toll booth clerk at the station and called for help, but the clerk merely looked on as the assailant dragged her back down the stairs to the subway platform and raped her multiple times, Albert said.

"He knew a rape was going on and sat in his booth for 10 minutes and did nothing," Albert said of the toll booth clerk. "And there is no public address system in that station, so he could not communicate with people on the level below. The whole thing is ludicrous. What the MTA is saying is that no matter how stupefying their lack of security is at this station, they are immune from this lawsuit because they are a government agency."

An MTA spokesman said the agency does not comment on pending litigation.

Besedina filed a suit against the Transit Authority, the toll booth clerk and a conductor who drove a train through the station as the rape was occurring but did not stop, on the grounds they should have stepped in to help, Albert said. A Queens Supreme Court judge heard a motion in mid-February from the Transit Authority, which asked for the case to be dismissed before it went to trial, Albert said.

The MTA argued that the toll booth clerk followed procedure by not leaving the booth, Albert said. The clerk hit a button that connected him to a command center, but the rapist had fled by the time police arrived 10 minutes later, he said.

The judge will determine within the next month whether the case should proceed, he said.

Albert said the victim, 21 at the time of the attack, had been en route to visit her boyfriend in Queens, who had recently had surgery.

Reach reporter Nathan Duke by e-mail at nduke@timesledger.com or by phone at 718-229-0300, Ext. 156.

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Freestyle Music > General Discussion > General Discussion - The Lounge > Father of teen killed in LIRR fall seeks damages, wants issues remedied

View Full Version : **Father of teen killed in LIRR fall seeks damages, wants issues remedied** PDA

KENNY GUIDO October 24th, 2006, 05:53 AM

Father of teen killed in LIRR fall seeks damages, wants issues remedied

BY REID J. EPSTEIN
Newsday Staff Writer

October 23, 2006

Peter Smead wants to meet face to face with the Long Island Rail Road officials he blames for the death of his teenage daughter, believing that they should have done something long ago to fix the gaps between the platforms and trains.

"This is not a problem that the railroad was not aware of. They knew it, they knew it," said Smead, who Monday filed a notice of claim against the LIRR and the Metropolitan Transportation Authority seeking $5 million in damages relating to Natalie Smead's death in August.

"I would like to be face to face with whoever the decision-makers are who made the decisions that led to this," said Smead from his office in the Minneapolis area, speaking publicly for the first time since his 18-year-old daughter's death. "At some point there is a human being who made that decision."

Smead's Long Island attorney, Bob Sullivan, said in the notice of claim that LIRR officials "did not care about danger to their passengers," and that the MTA and LIRR knew about the gap problem and did nothing to fix it.

"I just want to emphasize the tragedy for me and for her mother, losing our only child to a tragedy that could have been prevented," said Smead, 48, a salesman in Northfield, Minn.

Natalie Smead's death has prompted gap investigations by the LIRR as well as state and federal officials.

In addition, a Newsday investigation found gaps as wide as 15 inches at some stations. The gaps throughout the LIRR have caused more than 330 incidents from 2000 through 2005, according to LIRR data.

After Smead's death, Newsday measured the gap at Woodside to be as wide as 11 inches, wider than the 7- to 8-inch gap the railroad considers to be its internal standard.

The LIRR has begun taking some measures to address the gap issue, including stepping up its public awareness campaign and moving tracks closer to the platform at certain stations. At Woodside, where Smead died, there currently are no plans to adjust the tracks, though LIRR officials say that they are evaluating the measurements at all the stations and will move tracks where they determined improvements can be made.

Monday, Sullivan blamed James Dermody, who retired as LIRR president Sept. 1 after a 48-year career at the railroad, for ignoring what he called a long-standing gap problem.

"They could have solved this problem 20 years ago, and they simply chose not to," Sullivan said. "James Dermody chose not to make the repairs."

Dermody did not return phone messages left Monday at his Mastic Beach home. LIRR spokesman Sam Zambuto referred questions to the MTA, and Tim O'Brien, an MTA spokesman, said the MTA does not comment on pending litigation.

The Journal News says (http://lohud.us/1gtFwvE) Jill Shiner Vandercar claims a dangerous grade crossing, defective emergency exits and poor decision-making contributed to her husband Eric's death.

The 53-year-old money manager was killed Feb. 3 when the Metro-North train he was riding crashed into an SUV stopped on the tracks in Valhalla.

Ellen Brody, the SUV driver, was killed along with five train passengers -- including Vandercar.

Named as defendants in the suit are the Metropolitan Transportation Authority, Westchester County, Westchester public works and transportation departments, and Mount Pleasant's highways superintendent.

The MTA declined to comment on the pending litigation. Lawyers for the country didn't respond to requests for comment.

Information from: The Journal News, http://www.lohud.com

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Health In A Handbasket

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Good Day Rochester

or both. Richard Bass, the chief planning and development specialist for Herrick, Feinstein, a law firm based in Midtown Manhattan, said that at three of the sites — on 97th Street, 72nd Street and 69th Street — the M.T.A. could have worked with private developers to incorporate the ancillary buildings into residential towers.

Mr. Bass represented a co-op on 69th Street in negotiations with the M.T.A. over the adjacent ancillary building. He is not involved in a lawsuit the co-op filed against the Federal Transit Administration and the M.T.A.

On each of the corners cited by Mr. Bass, the developers could have sought development rights, known as air rights, from smaller adjacent residential buildings, Mr. Bass said. He said taller apartment buildings would have been more in character with a residential neighborhood and would have helped fill a need for moderately priced housing. In addition, the M.T.A. could have had the developers share in the cost of the subway structures, Mr. Bass said.

"It seems that the M.T.A. missed an opportunity to play in the real estate game in a way that would have been a win-win-win," Mr. Bass said. "This could have provided the M.T.A. with a more cost-effective facility, a more urbanistically appropriate structure for the surrounding community, and an opportunity to create more housing in partnership with developers."

Citing the pending lawsuit filed by the 69th Street co-op, M.T.A. officials were unwilling to be interviewed. But they did agree to answer written questions by e-mail. They said they would not release cost estimates for the ancillary buildings until they had hired the contractors. Nor would they say how much they had paid for the building sites.

Kevin Ortiz, an M.T.A. spokesman, said by e-mail that the agency had worked with developers on both the 97th Street site, where the Century Lumber Corporation once stood, and on 72nd Street, the longtime home of Falk Drug and Surgical Supplies. Plans for 72nd Street, where the site measures 75 feet by 75 feet, were scuttled because "in order for a development to work, additional property would have had to be acquired, which we couldn't justify as a transportation use."

SMITH: But since the terrorist attacks on September 11th, the turban has made Sikhs a visible target for discrimination. They say many people mistake the turban and the beard and the dark skin as a sign that they're Muslim or Arab. In fact, Sikhism started out in the Punjab region of India and Pakistan, and is distinct from Islam or Hinduism. The religion requires that men always keep their hair covered by a cloth, sometimes eight yards long, that they wrap into a turban. In the last few years, Sikhs have fought legal battles to be allowed to wear the turban in schools, in jails and in the workplace.

Yesterday, Harrington filed a federal lawsuit challenging the requirement that he wear an MTA logo on his turban. He was joined by five other Sikhs who work as token booth clerks and say they've been subjected to the same restrictions. Inderjit Singh, who works a booth on the A line at 42nd Street, says he refused.

Mr. INDERJIT SINGH (MTA Employee): As a Sikh religious man, I cannot put anything on my turban. It's like that, if they ask any Christian--they ask the Christian, `On the cross, you put the MTA logo on the cross.' It's the same thing for me.

SMITH: The Transit Authority says they will not comment on pending litigation. In the past, however, they've called the patch requirement a fair compromise, and legally employers only have to make reasonable accommodations for religious practices. David Gregory teaches employment law at St. John's University in New York.

Mr. DAVID GREGORY (St. John's University): The employer would say, in the case that you pose, `Look, I'm making a major concession to the employee allowing him to wear his turban. And there should be a quid pro quo and he should be identified to the public as an MTA employee.'

SMITH: But Gregory says the MTA will have to show that the Sikh employees are not being unfairly singled out for enforcement of the uniform rules and that's where the Sikhs feel they have a good case. Employees of the subway system can routinely be seen wearing Yankees or Mets or Nike caps. A federal discrimination investigation

Artikel drucken: **Ex-NY state senator to sue MTA over gap (http://www.finanznachrichten.de/nachrichten-2006-10/7212923-ex-ny-state-senator-to-sue-mta-over-gap-020.htm)**

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Ex-NY state senator to sue MTA over gap

NEW YORK (AFX) - A former state senator who broke her leg after falling into a platform gap at a Long Island Rail Road station has filed a $1 million notice of claim against the railroad and its parent company, the Metropolitan Transportation Authority.

Carol Berman, 83, said she hoped 'to increase the pressure on the railroad and the MTA to actually fix this gap.'

Berman said she fell through a 10-inch gap at the Lawrence station last month, breaking her left leg.

The former legislator filed her notice of legal action with the agencies on Thursday. Also this week, the father of a Minnesota teenager killed in an August gap fall said he planned to sue the LIRR and the MTA.

The MTA said it does not comment on pending litigation.

The LIRR has already elevated the tracks at the Shea Stadium stop in Queens, and moved them as much as 4.5 inches toward the platform. Similar changes will be made in at least seven other stations.

Peter Smead, the father of Natalie Smead of Northfield, Minn., has said he intends to seek $5 million in damages in his daughter's death. The 18-year-old woman slipped through an almost foot-wide gap as she was getting off a westbound train at Woodside, Queens, and was struck by a train.

Another woman, Sheila Rann, 67, a former Rockette who was paralyzed after falling through a gap in Forest Hills, Queens, has a $50 million suit pending against the MTA.

Information from: Newsday, http://www.newsday.com

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Sue Bus Driver For Negligence That Got 8-Yr-Old Hit by Car

By SARAH DORSEY | Posted: Friday, May 22, 2015 3:45 pm

A city bus driver knowingly separated a scared 8-year-old boy from his grandmother, deposited him at a busy intersection away from a bus stop, and drove away, leaving the child to get hit by a car crossing the street to reach the grandmother, a lawsuit against the Metropolitan Transportation Authority has alleged.

The suit, brought by the mother of Jervir Maycock, was filed in Brooklyn State Supreme Court after the child was severely injured in the crash. It named the Metropolitan Transportation Authority; the driver of the car, Akeshia Joseph; and the Bus Operator—who was listed as John Doe because the family has never learned his name.

'IF DRIVER HAD ONLY WAITED...'

'IF DRIVER HAD ONLY WAITED...': Attorney Carmen Giordano has filed suit against the Metropolitan Transportation Authority and an unnamed Bus Operator on behalf of 8-year-old Jervir Maycock, who was separated from his grandmother and dropped off on a street corner away from a bus stop. The suit claims that the driver knowingly separated the pair; the boy suffered horrific injuries after dashing across an intersection to rejoin his grandmother.

Did He Ignore Pounding?

According to the complaint, Jervir boarded a B46 bus at Malcolm X Blvd. and Fulton St. in Bedford-Stuyvesant on June 6, 2014. It was rush hour, sometime between 5:45 p.m. and 6:15 p.m.

The driver closed the door before his grandmother could board, and "completely ignored" her when she pounded on the door and the side of the bus, Jervir's mother, Sharon Worrell, claimed in the suit. He allegedly told Jervir to wait, quickly drove through a light before it turned red, then dropped him off on the other side of the intersection, where there was no bus stop. Jervir immediately began to run back toward his grandmother, across lanes of traffic.

MTA spokesman Kevin Ortiz declined to comment on pending litigation. But Carmen Giordano, the child's lawyer, described the scene as the grandmother explained it.

"Jervir was saying, 'Granny! Granny!" Mr. Giordano said; the child was "pretty much petrified" because he's too young to travel alone. The attorney explained that Jervir saw another bus pull up next to his grandmother and was afraid she would get on it and leave.

Forced Boy to Cross

The team's lawsuit also claims the MTA refuses to release its letter of credit, despite what they cite as MTA Chairman Peter Kalikow's promise to Jets president Jay Cross in an Aug. 3, 2006, phone conversation that the team would be "off the hook" for the oil spill and the letter of credit once negotiations with the city began.

Kalikow declined to comment, citing the pending litigation.

Even an MTA source close to the negotiations couldn't understand why the agency has not released the Jets' letter of credit and continues to press the team on the spill cleanup.

The Jets also refused to comment on the spill's specifics or the estimated cost of cleaning it up, citing the looming court battle.

kboniello@nypost.com

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killed when the ferry crashed into a terminal. Smith later pleaded guilty to seaman's manslaughter and admitted he had taken pain medication that can cause drowsiness before reporting to work.

Smith's lawyer, Abramson, noted, though, that the prosecution was made possible by a little-used maritime law that makes negligence in ferry operations a crime. No such law governs railway operations. One of Smith's supervisors was convicted and sentenced to jail time under the unusual law.

As for civil litigation, lawyers said Metro-North and its parent, the Metropolitan Transportation Authority, may have a hard time avoiding millions of dollars in damages over the injuries and deaths.

"If he fell asleep at the switch, I don't see how they can defend themselves," said David Cook, a partner at Kreindler and Kreindler, a law firm that specializes in transportation accidents.

He said, however, that under New York law the families of killed passengers could be limited in what they recover compared to what they might get in other states. Plaintiffs might also have a harder time recovering punitive damages if the engineer's story about nodding off proves true.

"We've all, unfortunately, experienced that moment where you have that momentary nod," Cook said.

The MTA declined to comment on the legal claims on Thursday. It has cited a policy against commenting on pending litigation.

Attorney Michael Lamonsoff, who is representing at least two passengers who were on the derailed train and has already filed a legal claim with Metro-North, said his clients were more interested in holding the railroad accountable for not installing safety equipment that could have prevented the accident than they were in seeing the engineer punished.

Congress ordered many railroads in 2008 to install a type of automated crash-avoidance technology called Positive Train Control but gave them until 2015 to comply.

"This technology existed and isn't nearly as costly as the cost of human life and misery caused by this accident," Lamonsoff said.

Metro-North, which runs between New York and Connecticut, has said installing the safety technology is a difficult and expensive process. Its parent agency and other railroads have pressed the government to extend the 2015 deadline a few years because of the cost and complexity of the Positive Train Control system, which uses GPS, wireless radio and computers to monitor trains and stop them from colliding, derailing or going the wrong way.

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Attorney for woman who fell plans to sue

The attorney for the woman who fell in the gap the Great Neck Long Island Rail Road station said he plans to sue the MTA/LIRR

Posted: Thursday, July 16, 2015 8:53 am

By Adam Lidgett

The attorney for the woman who fell in the gap between the platform and a westbound train at the Great Neck Long Island Rail Road station two weeks ago said he plans to file a suit against the Metropolitan Transportation Authority and the LIRR for the incident.

Michael Levine said he will file suit on behalf of his client, Sima Hakimian, 65, of Great Neck, who fell into the gap after being jostled or accidentally pushed by another passenger.

"The MTA doesn't negotiate with anybody, they just don't do it," Levine said. "The only way to get the MTA or LIRR is to put the case into suit and to process a lawsuit."

Levine said doctors have so far determined that Hakiian suffered multiple rib fractures, a collapsed lung and a fractured clavicle in the fall . Levine said he should know the full extent of the injuries when he receives a medical report, which he said he should receive within 60 days.

He said Hakimian is recuperating at home.

Meredith Daniels, media liaison for the Metropolitan Transportation Authority, said the MTA doesn't comment on pending litigation. She said the incident is under investigation.

Hakimian was removed from the train tracks by members of the Vigilant Engine & Hook & Ladder Company *after falling between the platform and a westbound train at about* 5:45 p.m. on July 2. The power to the 750 volt third rail was shut off after Hakimian fell and service was suspended on the Port Washington line while fire and rescue workers tried to remove her from tracks.

Regardless of the number of accessible stations, advocates believe the transit authority should take advantage of projects, such as the one at Dyckman Street, to bring stations into compliance. James Weisman, general counsel for the United Spinal Association, called the renovation an "opportunity overlooked."

For the disabled, "the station is a transit waste land if you can't climb the stairs, " Edith Prentiss, vice president of legislative affairs for Disabled In Action of Metropolitan New York (http://www.disabledinaction.org/) and co-chair of the Taxis For All Campaign, wrote in an email.

"There are no buses on Dyckman," complained Prentiss, who uses a wheelchair and lives in the neighborhood. "The only accessible place to fill a MetroCard is the 207th Street A train on Broadway. MetroCard vans and buses are not accessible, either."

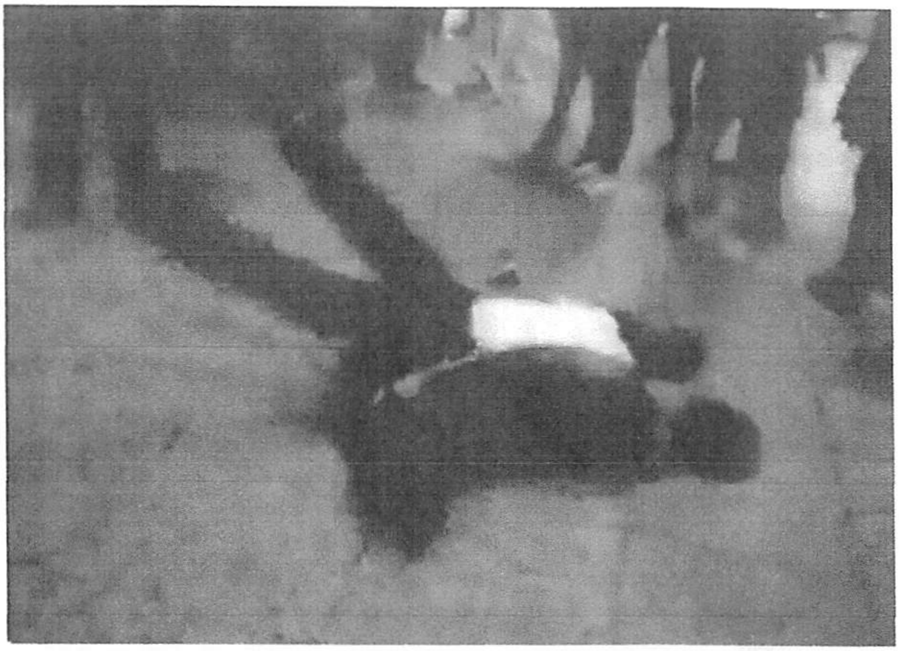
The MTA won't comment on pending litigation, but said its plans for Dyckman Street include:

- repairing stairs from sidewalk into station;
- replacing stairs from control area to platforms;
- demolishing and reconstructing north and southbound platforms;
- installing new platform windscreens and repair guardrails.

The class-action suit has been filed in federal court for the Southern District of New York.

Above Ground

This is not the only legal action on disabled access confronting the transportation authority. In August, several disability-rights groups including Disabled in Action of Metropolitan New York and Brooklyn Center for the Independence of the Disabled (http://www.bcid.org/) sued the MTA, alleging its budget cuts disproportionately affected the disabled and elderly (http://www.legalservicesnyc.org/index.php?option=com_content&task=view&id=506&Itemid=98) and violated a different provision of the disabilities act. Those cuts eliminated 89 bus lines -- particularly routes traveling between boroughs (http://brooklynheightsblog.com/archives/date/2010/06/page/4) --



Matrisciano asserts he was found guilty by the MTA without being given the chance to rebut the allegations.

RELATED: FIRED DETECTIVE WHO TOOK XXX PICS OF RAPE VICTIM SUES TO KEEP PENSION

'[The MTA defendants] were eager to force the plaintiff's termination while ignoring far more egregious acts by other officers including arrests for insurance fraud [and] domestic violence,' the suit contends.

Matrisciano, a 10-year-veteran, has been suspended from the force without pay, a source said, despite claiming in the suit that he has already been fired.

An MTA spokesman said the agency would not comment on pending litigation. Matrisciano's lawyer did not return a call.

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"It's a big face wrapped in cellophane," said the attorney. "It scares her.... That little shock was enough of a trigger to throw her off balance."

Njewadda fell down the stairs, fracturing her right foot, spraining her right ankle and hitting her head, he said.

Named in the lawsuit were Showtime, the New York City Transit Authority, CBS Outdoor Americas which contracted to place the ad, the Metropolitan Transportation Authority and New York City, he said.

"This is the media saturation and over-commercialization of public space," the lawyer said. "This ad was a shockvertisement."

He declined to say how much money his client was seeking, only to say they were seeking "a fair deal."

A spokeswoman at the MTA said it does not comment on pending litigation.

Showtime could not immediately be reached for comment.

(Reporting by Ellen Wulfhorst; Editing by Sandra Maler)

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But that scenario became Tyreek Gomez's reality, the recently filed lawsuit claims, when the door of an S78 bus closed on him before he was completely inside, pulling him almost 25 feet and mangling his left leg before he could free himself.

Tyreek's mother, Tiresha Boyd, contends her son was seriously injured in the Dec. 21, 2012 incident and blames the MTA and the city.

"He told me he thought he was going to die," Ms. Boyd told the Advance that evening from her son's hospital room in Richmond University Medical Center, West Brighton.

Her suit, filed in state Supreme Court, St. George, seeks unspecified monetary damages on behalf of her son and herself.

The episode occurred just before 7 a.m. at the corner of Broad Street and Tompkins Avenue, Stapleton, court papers said.

TAKES 2 BUSES

Tyreek was preparing to start his hourlong commute via two city buses to the John Lavelle Charter School at the Teleport in Bloomfield.

Court papers said he was in the process of boarding the bus when the driver "suddenly and without warning" closed the door before the boy was completely aboard.

Ms. Boyd said the driver closed the door on Tyreek's right leg, according to Advance reports. She said Tyreek was dragged about 25 feet; his dangling left leg was mangled.

After managing to free himself, the injured child crawled onto the sidewalk. His mother said one witness called 911 while another let Tyreek borrow a cell phone to call her at work.

Police confirmed the incident and said no charges were filed against the driver, whose identity was not disclosed, Advance reports said.

A spokesman for the MTA confirmed then that a boy had suffered an injury of his leg on one of its buses but could not confirm Mrs. Boyd's account. The spokesman said the incident was being investigated.

Ms. Boyd said at the time that her son was being treated for muscle and tissue damage of his left leg.

Court papers do not specify his injuries beyond saying they are "severe and serious."

Ms. Boyd's lawyer, Michael H. Bush of the New Dorp firm Chelli & Bush, declined to provide further details this week, citing the pending litigation.

The MTA likewise declined comment, citing the pending litigation.

A spokeswoman for the city Law Department said the suit papers are under review and declined further comment.

(ii) If the employee who, as a result of an injury sustained in the course of his/her employment, has completed less than ten (10) years of service at the time of his physical disqualification, is performing the work of another title, he/she shall receive the same rate of pay which he/she was receiving at the time of disablement or the minimum rate of pay for such other title, whichever is greater. Should the employee continue to perform the work of such other title, he/she shall receive not less than the rate of pay appropriate to the length of time he/she shall have performed work of such other title, subsequent to his/her disqualification from the work of his/her own title.

(iii) If an employee who, as a result of a physical condition resulting from a cause other than an injury sustained in the course of his/her employment, has completed less than ten (10) years of service at the time of his physical disqualification, is performing the work of another title, he/she shall receive the highest standard rate established for that title which is not above the minimum rate of pay for his original title. Should the employee continue to perform the work of such other title, he/she shall receive not less than the rate of pay appropriate to the length of time he/she shall have performed work of such other title, subsequent to his/her disqualification from the work of his/her own title.

A2. The determination that any employee is disabled from performing the full duties of his/her position shall be within the exclusive determination of the Transit Authority, on the advice of its Medical Department, whose findings shall be final and binding and not subject to review or arbitration (except as explicitly provided for in Section 2.1 of this Agreement).

B. The Transit Authority's Medical Department in reporting an employee to be physically disqualified for the performance of the full duties of his/her title, shall specify whether the physical disqualification is temporary or permanent, and shall periodically re-examine each employee who shall have been adjudged to be thus temporarily or permanently disqualified, and when it is found (1) that such an employee is able to return to the full duties of his/her title, or (2) that a determination of temporary disqualification, should be changed to one of permanent disqualification, shall make the immediate report thereof to the Transit Authority, provided, however, that when an employee has remained physically disqualified for the performance of the full duties of his/her title for a period of a full year, he/she shall be deemed to be permanently disqualified therefor until the Transit Authority's Medical Department shall adjudge him/her qualified.

C. If and when the Transit Authority's Medical Department shall certify that a permanent employee, previously disqualified by physical disability from performing the duties of his/her position, is able to return to those duties, he/she will be reassigned thereto with the same preference status which he/she held at the time of his/her disqualification.

D. Any employee who has been disqualified by the Division of Medical Services or a medical consultant utilized by the Authority and who disputes the medical findings of the examining consultant, shall have the right to utilize the provisions of Section 2.1.

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DECISION OF THE BOARD
DECISIÓN DE LA JUNTA

Mailed and Filed: NOV 04 2016

IN THE MATTER OF: **Appeal Board No. 591444 A**

BRIAN BURKE
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NYC TRANSIT AUTHORITY
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NEW YORK NY 10271

A.S.O. - Appeals Section
Department of Labor Office: 831

A.L.J. Case No. 016-00819

PLEASE TAKE NOTICE that the commissioner, or any other party affected by this decision who appeared before the Appeal Board, may appeal questions of law involved in such decision to the Appellate Division of the Supreme Court, Third Department, by written notice mailed to the Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 within THIRTY DAYS from the date this decision was mailed.

POR FAVOR TOME NOTA que el comisionado o cualquier otra parte afectada por esta decisión que haya comparecido ante la Junta de Apelaciones puede apelar aspectos legales de dicha decisión a Appellate Division of the Supreme Court, Third Department, enviando un aviso escrito a Unemployment Insurance Appeal Board, PO Box 15126, Albany, New York 12212-5126 dentro de los TREINTA DIAS a partir de la fecha en que esta decisión fue enviada por correo.

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PRESENT: JAMES S. ALESI, MEMBER

The claimant applied to the Appeal Board pursuant to Labor Law § 534 for a reopening and reconsideration of Appeal Board No. 589582, filed June 17, 2016, which affirmed the decision of the Administrative Law Judge and sustained the initial determinations ruling the claimant not entitled to receive benefits, effective October 19, 2015, on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the claimant had insufficient earnings in covered base period employment.

Upon consideration of the application to reopen, after due notice to the parties, the Board has decided to reopen and reconsider its decision.

The Board makes the following:

FINDINGS OF FACT: The claimant was employed by a transportation authority for approximately fourteen years. Prior to April 2014, the claimant had been a train operator, earning $33.00 an hour in base pay and time and a half for any overtime hours. The employer paid its employees every two weeks; the pay period began on Sundays and ended on Saturdays. Pay checks were issued on Thursdays (that is, the pay check for a pay period which ran, for example, from January 1-25, 2014, was issued on January 30, 2014). He stopped working on April 15, 2014, claiming that he had sustained a work-related injury. The claimant filed a claim with Workers' Compensation, which was controverted by the employer. As a result, the claimant did not receive Workers' Compensation benefits; instead, using a procedure known as waiver of election, he received his accrued sick and vacation leave. The claimant filed a claim for unemployment insurance benefits which was made effective June 9, 2014, establishing a weekly benefit rate of $386.00.

The claimant did not return to work until March 2015. At that time, he was reclassified as a station agent but at the same pay rate as he had received as a train operator. At the time that the claimant returned to work, he had no accrued sick or vacation leave, as it had been used pursuant to his waiver of election. His new accruals would be front loaded on June 1, 2015.

The claimant worked eight hours a day on March 23, 24, 25, 26, 27, 30, and 31, and on April 1, 2, and 3, 2015; he also worked four and one-quarter hours on April 6, 2015, for a total of 84 ¼ hours. These days were at his base rate. The claimant worked overtime for one hour on March 27, 2015 and for one hour on April 3, 2015. The claimant was never paid for his work on those days. The claimant last worked on April 6, 2015, again claiming that he had sustained a work-related injury.

The claimant filed a claim for benefits on October 23, 2015, which was made effective October 19, thus establishing a basic base period which began July 1, 2014, and ended May 30, 2015, and an alternate base period which began September 1, 2014, and ended September 30, 2015. The claimant was credited with $13,039.93 in wages for the third quarter of 2014, and $2,519.74 in wages for the first quarter of 2015. The claimant did not work for any other employer during his base period or receive any wages other than those credited to him.

OPINION: Labor Law § 527 provides that in order to establish a valid original claim, a claimant must have been paid remuneration for employment in at least two quarters of the base period, with remuneration of one and one-half times the high quarter remuneration, and with high quarter earnings of at least 221 times the minimum wage as provided for in Labor Law § 652, rounded down to the nearest $100.00. (At the time the claimant filed his claim, his high quarter wages would have to equal at least $1,900.00, a requirement which he has met.)

The credible evidence establishes that the Department of Labor credited the claimant with $13,039.93 in wages for the third quarter of 2014, and $2,519.74 in wages for the first quarter of 2015. If only those wages credited to the claimant are considered, he does not meet the requirements of Labor Law § 527. The issue is the nearly two weeks of work he performed during the first and second quarters of 2015, for which he did not receive his wages. The employer's witness produced time records reflecting the days that the claimant worked. She also conceded that the claimant had not received his pay check and had no explanation for why a check had not been issued to him.

Labor Law § 191 (1) (d) provides that workers (not otherwise specified in subsections [a[through [c]) "shall be paid wages earned in accordance with the agreed terms of employment . . . on regular pay days designated in advance by the employer". Based on the pay records entered into evidence, the claimant was entitled to be paid on every other Thursday, for the two week period which had ended the prior Saturday. As noted above, it is uncontested that the claimant worked in April and March 2015, but was not paid for those days, for reasons unknown to and unexplained by the employer's witness. The Board has previously held that when a claimant is not paid as required by Labor Law § 191, the earnings referenced in Labor Law § 527 should be equated with the term "remuneration earned" as set forth in the Department of Labor's regulations at12 NYCRR § 470.2 (*see*, Appeal Board Nos. 573732, 582941, and 588684).

FINDINGS OF FACT: The claimant was employed by a transportation authority for approximately fourteen years. Prior to April 2014, the claimant had been a train operator, earning $33.00 an hour in base pay, and time and a half for any overtime hours. The employer paid its employees every two weeks; the pay period began on Sundays and ended on Saturdays. Pay checks were issued on Thursdays (that is, the pay check for a pay period which ran, for example, from January 4-17, 2014, was issued on January 30, 2014). He stopped working on April 15, 2014, claiming that he had sustained a work-related injury. The claimant filed a claim with Workers' Compensation, which was controverted by the employer. As a result, the claimant did not receive Workers' Compensation benefits; instead, using a procedure known as waiver of election, he received his accrued sick and vacation leave. The claimant filed a claim for unemployment insurance benefits which was made effective June 9, 2014, establishing a weekly benefit rate of $360.00.

The claimant did not return to work until March 2015. At that time, he was reclassified as a station agent but at the same pay rate as he had received as a train operator. At the time that the claimant returned to work, he had no accrued sick or vacation leave, as it had been used pursuant to his waiver of election. His new accruals would be front loaded on June 1, 2015.

The claimant worked eight hours a day on March 23, 24, 25, 26, 27, 30, and 31, and on April 1, 2, and 3, 2015; he also worked four and one-quarter hours on April 6, 2015, for a total of 84 ¼ hours. These days were at his base rate. The claimant worked overtime for one hour on March 27, 2015 and for one hour on April 3, 2015. The claimant was never paid for his work on those days. The claimant last worked on April 6, 2015, again claiming that he had sustained a work-related injury.

The claimant filed a claim for benefits on October 23, 2015, which was made effective October 19, thus establishing a basic base period which began July 1, 2014, and ended May 30, 2015, and an alternate base period which began September 1, 2014, and ended September 30, 2015. The claimant was credited with $10,038.93 in wages for the third quarter of 2014, and $2,318.74 in wages for the first quarter of 2015. The claimant did not work for any other employer during his base period or receive any wages other than those credited to him.

OPINION: Labor Law § 527 provides that in order to establish a valid original claim, a claimant must have been paid remuneration for employment in at least two quarters of the base period, with remuneration of one and one-half times the high quarter remuneration, and with high quarter earnings of at least 22 times the minimum wage as provided for in Labor Law § 652, rounded down to the nearest $100.00. (At the time the claimant filed his claim, his high quarter wages would have to equal at least $1,900.00, a requirement which he has met.)

The credible evidence establishes that the Department of Labor credited the claimant with $10,038.93 in wages for the third quarter of 2014, and $2,318.74 in wages for the first quarter of 2015. If only those wages credited to the claimant are considered, he does not meet the requirements of Labor Law § 527. The issue is the nearly two weeks of work he performed during the first and second quarters of 2015, for which he did not receive his wages. The employer's witness produced time records reflecting the days that the claimant worked. She also conceded that the claimant had not received his pay check, and had no explanation for why a check had not been disbursed to him.

Labor Law § 191 (1) (d) provides that workers (not otherwise specified in subsections [a] through [c]) "shall be paid wages earned in accordance with the agreed terms of employment . . . on regular pay days designated in advance by the employer." Based on the pay records entered into evidence, the claimant was entitled to be paid on every other Thursday, for the two week period which had ended the prior Saturday. As noted above, it is uncontested that the claimant worked in April and March 2015, but was not paid for those days, for reasons unknown to and unexplained by the employer's witness. The Board has previously held that when a claimant is not paid as required by Labor Law § 191, the earnings referenced in Labor Law § 527 should be equated with the term "remuneration earned" as set forth in the Department of Labor's regulations at 12 NYCRR § 470.2 (see, Appeal Board Nos. 573152, 582941, and 585684).

According to the employer's records and the claimant's testimony, the claimant worked for 84 ¼ hours at his basic pay rate (although the employer's records reflect the claimant's first day back at work as March 24th, we accept the claimant's first hand testimony that his first day back at work was March 23rd). As a result, he should have received $2,780.25 in earnings. He also worked two hours of overtime, and should have received $99.00 at his overtime rate. Based on the pay schedule, he should have received total remuneration of $2,879.25, paid on pay days in the second quarter of 2015. Consequently, following our precedent, we now credit the claimant with that remuneration in order to determine whether he has sufficient wages to establish a valid original claim.

Pursuant to Labor Law § 527 (1), the claimant's high quarter wages should be capped at $9,350.00 (22 times the maximum benefit rate of $425). One and one-half times that amount equals $14,025. Adding the wages he was credited with for the first quarter of 2015 and the wages he should have been paid in the second quarter of 2015 to the capped high quarter wages, gives the claimant total remuneration in his base period of $14,748.99. Consequently, the claimant meets the requirements of Labor Law § 527 that he have received remuneration in two quarters of his base period, with total remuneration equaling at least one and one-half times his high quarter wages. The claimant's earnings also establish that he has met the requirements of Labor Law § 527 (6), that a claimant who had filed a previous valid original claim must have subsequently earned an amount equal to at least ten times the claimant's weekly benefit rate, as established by the previous claim. Accordingly, we conclude that the claimant has established a valid original claim, and the matter referred back to the Department of Labor to calculate the claimant's weekly benefit rate.

The claimant has also raised unsubstantiated allegations that he was also due approximately $21,000.00 in pay by the employer. In our earlier decision, we advised the claimant that he could apply to reopen upon the receipt of a favorable final decision, from an arbitration or otherwise, as to his claim for unpaid wages. No such decision having been produced, the claimant's allegations remain unfounded and should not be considered in determining his benefit rate.

DECISION: The decision of the Appeal Board is rescinded.

The decision of the Administrative Law Judge is reversed.

The initial determinations, ruling the claimant not entitled to receive benefits, effective October 19, 2015, on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the claimant had insufficient earnings in covered base period employment, are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

The matter is referred back to the Department of Labor to calculate the claimant's weekly benefit rate.

JAMES S. ALESI, MEMBER

NB:DE

According to the employer's records and the claimant's testimony, the claimant worked for 84.11 hours at his basic pay rate (although the employer's records reflect the claimant's first day back at work as March 24th, we accept the claimant's first hand testimony that his first day back at work was March 23rd). As a result, he should have received $2,780.25 in earnings. He also worked two hours of overtime, and should have received $98.00 at his overtime rate. Based on the pay schedule, he should have received total remuneration of $2,878.25 paid on pay days in the second quarter of 2015. Consequently, following our precedent, we now credit the claimant with that remuneration in order to determine whether he has sufficient wages to establish a valid original claim.

Pursuant to Labor Law § 527 (1), the claimant's high quarter wages should be capped at $9,350.00 (22 times the maximum benefit rate of $425). One and one-half times that amount equals $14,025. Adding the wages he was credited with for the first quarter of 2015 and the wages he should have been paid in the second quarter of 2015 to the capped high quarter wages, gives the claimant total remuneration in his base period of $14,718.59. Consequently, the claimant meets the requirements of Labor Law § 527 that he have received remuneration in two quarters of his base period, with total remuneration equaling at least one and one-half times his high quarter wages. The claimant's earnings also establish that he has met the requirements of Labor Law § 527 (3), that a claimant who had filed a previous valid original claim must have subsequently earned an amount equal to at least ten times the claimant's weekly benefit rate, as established by the previous claim. Accordingly, we conclude that the claimant has established a valid original claim, and the matter is referred back to the Department of Labor to calculate the claimant's weekly benefit rate.

The claimant has also raised unsubstantiated allegations that he was also due approximately $21,000.00 in pay by the employer. In our earlier decision, we advised the claimant that he could apply to reopen upon the receipt of a favorable final decision, from an arbitration or otherwise, as to his claim for unpaid wages. No such decision having been produced, the claimant's allegations remain unfounded and should not be considered in determining his benefit rate.

DECISION: The decision of the Appeal Board is rescinded.

The decision of the Administrative Law Judge is reversed.

The initial determinations, holding the claimant not entitled to receive benefits, effective October 19, 2015, on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the claimant had insufficient earnings in covered base period employment, are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

The matter is referred back to the Department of Labor to calculate the claimant's weekly benefit rate

JAMES S. ALESI, MEMBER

MB:CE

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office

33 Whitehall Street, 5th Floor
New York, NY 10004-2112
Intake Information Group: (800) 669-4000
Intake Information Group TTY: (800) 669-6820
New York Status Line: (866) 408-8075
New York Direct Dial: (212) 336-3620
TTY (212) 336-3622
FAX (212) 336-3625
Website: www.eeoc.gov

April 4, 2017

Brian Burke
145 East 23 St., Apt. 4r
New York, NY 10010

Dear Mr. Burke,

In response to your request for a copy of the Notice of Right to Sue issued to you as Charging Party in connection with charge #520-2008-02711, we advise that this file no longer exists, as our records room was destroyed by flood in 2012.

We can confirm that our records report the issuance of the notice at Charging Party request on *June 30, 2008, as authorized by (then) supervisor Hazel Stewart. According to our procedures,* the employer would have been notified of this action at the same time.

The above information is drawn from our database.

I hope this is meets your needs.

Sincerely,

Electra Yourke
Enforcement Manager

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
New York District Office

33 Whitehall Street, 5th Floor
New York, NY 10004-2112
Intake Information Group: (800) 669-4000
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New York Status Line: (866) 408-8075
New York Direct Dial: (212) 336-3620
TTY (212) 336-3622
FAX (212) 336-3625
Website: www.eeoc.gov

April 4, 2017

Brian Burke
145 East 22 St., Apt. 4I
New York, NY 10010

Dear Mr. Burke,

In response to your request for a copy of the Notice of Right to Sue issued to you as Charging Party in connection with charge #520-2008-02713, we advise that this file no longer exists, as our records room was destroyed by flood in 2012.

We can confirm that our records report the issuance of the notice at Charging Party request on June 30, 2008, as authorized by (then) supervisor Hazel Stewart. According to our procedures, the employer would have been notified of this action at the same time.

The above information is drawn from our database.

I hope this is meets your needs.

Sincerely,

[signature]

Elektra Yourke
Enforcement Manager

PERSONNEL SERVICES BULLETINS (PSBs)

200-10

Subject: Rights to Former Positions for Probationary Employees

Source: 1995 - 2001 Citywide Agreement; Personnel Rules and Regulations of the City of New York

Date: April 17, 2000

I. Background

Rule 5.2.3 of the Personnel Rules and Regulations of the City of New York states that "upon promotion, the position formerly held by the person promoted shall be held open for the promotee, and shall not be filled, except on a temporary basis, pending completion of the probationary term." Thus, any competitive, non-competitive, or labor class employee who has completed the required probationary period and who subsequently promotes to a position in the competitive class which requires a new probationary period may return to his/her former position if such employee does not complete the probationary period in the promoted title. There is no comparable rule for employees who make lateral moves to other agencies within City government.

In recent years, many City employees have changed career paths and sought positions with the City outside of their current occupational groups or service. This has been accomplished, in part, via title changes and new appointments, some of which require the imposition of a new probationary period. There have been instances where such employees (some of whom have completed their probationary periods in their former titles) have been terminated during their probationary periods in their subsequent titles for unsatisfactory performance. Although the Personnel Rules and Regulations permit the reinstatement of employees to their former positions under certain conditions, such reinstatements are discretionary on the part of the agency head and do not apply to all jurisdictional classes.

It has been and will continue to be the City's policy to encourage its employees to seek advancement opportunities within City government. This can be accomplished, in part, by affording certain employees who take positions outside of their occupational groups or service the right to return to their former positions. Consequently, a new clause in the Citywide Agreement provides for such rights.

II. Policy

The new provision states that employees serving permanently (footnote 1) in a competitive, non-competitive, or labor class title who are covered by the Citywide Agreement and who work in an agency covered by the Personnel Rules and Regulations of the City of New York ("PRR") ("covered employees") who are appointed to another position in the competitive, non-competitive, or labor class that requires serving a new probationary period and in an agency covered by the PRR, shall have the right to return to their former title and agency if they do not satisfactorily complete the new probationary period.

> ***Example:*** a permanent Civil Engineer at the Department of Environmental Protection ("DEP") is offered a probable permanent position as a Police Officer at *the New York City Police Department* ("NYPD"). *The Police Officer does not pass* probation; he has the right to return to DEP as a Civil Engineer. However, the reverse is not true. The Police Officer who accepts a position as a Civil Engineer and does not pass probation does not have the right under this policy to return to his former position of Police Officer since he was not a covered employee, i.e., as a Police Officer, he was not covered by the Citywide Agreement.

Upon receipt of their conditional resignation and request for a leave pursuant to the procedures described herein, eligible employees shall be granted a Leave of Absence for the duration of the probationary period in the subsequent position. ***Unlike many leaves of absence, there is no discretion on the part of the agency for granting this type of leave.*** Two new Reason Codes unique to these transactions will be established. The new Reason Codes are: L20 "Leave pending probation per PSB No. 200-10" and R71 "Conditional resignation per PSB No. 200-10." The Office of Payroll Administration will issue a User Bulletin with instructions on the use of the new Reason Codes.

When an employee granted a leave pursuant to this PSB does not satisfactorily complete the probationary period in the subsequent position, said employee shall be returned to his/her former title and agency, provided said employee continues to meet the qualification and residence requirements applicable to his/her former title. If such requirements are met, ***there is no discretion on the part of the former agency with respect to this matter.***

> ***Example:*** a covered employee on leave from her Motor Vehicle Operator ("MVO") position at DEP resigns from her position as a probationary Staff Analyst at NYPD. While employed as an MVO, she was required to maintain a driver's license valid in New York State. However, she allowed her license to lapse while with the NYPD. In this case, she would not be eligible to return to her former position.

Upon completion of the probationary period in the subsequent job, the employee shall submit the agreed upon letter of resignation from his/her former position to the former employer. At the close of the probationary period, the former employer will terminate the leave and the position, unless notified by the employee of any extensions of his/her probationary period. Therefore, it is the responsibility of the employee to notify the former employer of any extensions of his/her probationary period so that his/her leave under this policy is not terminated prematurely.

The leave policy set forth herein shall be effective November 26,1999, and shall only apply to covered employees who begin their subsequent positions on or after said date. If a covered employee, in compliance with prior policy and procedures, resigned his/her former position on or after November 26, 1999, but prior to the publication of this policy, such employee shall be deemed subject to the provisions of this PSB, provided he/she meets all the requirements under this policy and was appointed to his/her subsequent position without a break in service.

Although employees who meet all the requirements for reappointment (whether on leave or not) pursuant to this policy will be reappointed to their former position, there is no guarantee of returning to their previous assignment, nor does this policy give employees on leave from their permanent titles while serving provisionally in another title the right to return to their provisional titles. However, this policy does not preclude the former employer from reappointing the employee to his/her former provisional position if the former employer so chooses.

> ***Example:*** a permanent Staff Analyst on leave to serve as a provisional Associate Staff Analyst who accepts an open competitive list appointment to Computer Specialist will not be granted a leave from the provisional Associate Staff Analyst position and does not have the right to return to that position.

The purpose of this policy is to give covered employees who have a definite job offer with either the same or another City agency covered by the PRR an opportunity to return to their former position if they do not successfully complete probation. Therefore, they must have a job offer covered under this policy, be in active pay status in the former job at the time of the job offer, and be in active pay status in the subsequent job at the time of application for reappointment.

> ***Example:*** a permanent Staff Analyst at DEP accepts a position as a probable permanent plumber at NYPD. During the probationary period, the employee resigns her plumber position to accept a job in private industry. While employed in private industry, she decides to return to her Staff Analyst position at DEP. Under this policy, she is not eligible to return, and her leave must be terminated if it has not already been terminated.

Nothing in this policy shall be construed to prohibit an agency, in its sole discretion, from reinstating employees who meet the requirements under the Reinstatement Rules, but who do not meet the eligibility requirements for a leave under this policy.

> ***Example:*** a permanent Carpenter at NYPD accepts a job offer as an Accountant at DEP. Under this policy, he cannot be granted a leave and has no right to return to

probationary period in the subsequent position. **Unlike many leaves of absence, there is no discretion on the part of the agency for granting this type of leave.** Two new Reason Codes unique to these transactions will be established. The new Reason Codes are: L20 "Leave pending probation per PSB No. 200-10" and [illegible] "Conditional resignation per PSB No. 200-10." The Office of Payroll Administration will issue a User Bulletin with instructions on the use of the new Reason Codes.

When an employee granted a leave pursuant to this PSB does not satisfactorily complete the probationary period in the subsequent position, said employee shall be returned to his/her former title and agency, provided said employee continues to meet the qualification and residence requirements applicable to his/her former title. If such requirements are met, **there is no discretion on the part of the former agency with respect to this matter.**

> **Example:** a covered employee on leave from her Motor Vehicle Operator ("MVO") position at DEP resigns from her position as a probationary Staff Analyst at NYPD. While employed as an MVO, she was required to maintain a driver's license valid in New York State. However, she allowed her license to lapse while with the NYPD. In this case, she would not be eligible to return to her former position.

Upon completion of the probationary period in the subsequent job, the employee shall submit the agreed upon letter of resignation from his/her former position to the former employer. At the close of the probationary period, the former employer will terminate the leave and the position, unless notified by the employee of any extensions of his/her probationary period. Therefore, it is the responsibility of the employee to notify the former employer of any extensions of his/her probationary period so that his/her leave under this policy is not terminated prematurely.

The leave policy set forth herein shall be effective November 26, 1999 and shall only apply to covered employees who begin their subsequent positions on or after said date. If a covered employee, in compliance with prior policy and procedures, resigned his/her former position on or after November 26, 1999, but prior to the publication of this policy, such employee shall be deemed subject to the provisions of this PSB, provided he/she meets all the requirements under this policy and was appointed to his/her subsequent position without a break in service.

Although employees who meet all the requirements for reappointment (whether on leave or not) pursuant to this policy will be reappointed to their former position, there is no guarantee of returning to their previous assignment, nor does this policy give employees on leave from their permanent titles while serving provisionally in another title the right to return to their provisional titles. However, this policy does not preclude the former employer from reappointing the employee to his/her former provisional position if the former employer so chooses.

> **Example:** a permanent Staff Analyst on leave to serve as a provisional Associate Staff Analyst who accepts an open competitive full appointment to Computer Specialist will not be granted a leave from the provisional Associate Staff Analyst position and does not have the right to return to that position.

The purpose of this policy is to give covered employees who have a definite job offer with either the same or another City agency covered by the PRR an opportunity to return to their former position if they do not successfully complete probation. Therefore, they must have a job offer covered under this policy, be in active pay status in the former job at the time of the job offer, and be in active pay status in the subsequent job at the time of application for reappointment.

> **Example:** a permanent Staff Analyst at DEP accepts a position as a probationary permanent plumber at NYPD. During the probationary period, the employee resigns her plumber position to accept a job in private industry. While employed in private industry, she decides to return to her Staff Analyst position at DEP. Under this policy, she is not eligible to return, and her leave must be terminated if it has not already been terminated.

Nothing in this policy shall be construed to prohibit an agency, in its sole discretion, from reinstating employees who meet the requirements under the Reinstatement Rules, but who do not meet the eligibility requirements for a leave under this policy.

> **Example:** a permanent Carpenter at NYPD accepts a job offer as an Accountant at DEP. Under this policy, he cannot be granted a leave and has no right to return to

his former position since he is not a covered employee at NYPD. However, if NYPD so desires, he can be reinstated to his Carpenter position provided he meets the requirements under the Reinstatement Rules.

III. Procedure

A. Prior to Leaving Former Position

A covered employee who is offered and accepts another position in an agency covered by the PRR where such position requires a new probationary period, must notify the former employer in writing upon acceptance of the offer. The employee must submit to his or her Personnel Director a "Conditional Resignation and Request for a Leave of Absence Pursuant to PSB No. 200-10," Form DP-2516 (see attached). To be eligible for a leave under this policy, the employee should submit the form no later than ten business days prior to the employee's last day in active status at the former agency, but in no case less than five business days prior to that date. (footnote 2) To allow the Personnel Director time to verify the information on the form and to determine whether the employee is eligible for a leave, the employee should submit this form as soon as possible.

If the employee does not meet the requirements for a leave as stated in this policy, the Personnel Director must so inform the employee in writing prior to the employee's last day of work. The written notification must include the specific reason(s) that the employee is ineligible, e.g., the employee is resigning to accept a job at OTB which is an agency not covered by the PRR. However, if the employee is eligible for a leave, the Personnel Director should inform the employee that if the employee returns to his/her former title, it will not necessarily be the same assignment and that he/she must continue to meet the qualification requirements and residence requirements applicable to his/her former title. Further, the employee must be notified about the limited leave and the termination of the leave once the probationary period is passed. All this information is included in Form DP-2516 (see attached).

B. Upon Notification of Termination

If an employee working for a City agency covered by the PRR who is on a leave of absence from another position pursuant to this policy is notified that he/she is being terminated or resigns before the completion of the probationary period, such employee may apply to the Personnel Director of his/her former agency for reappointment to his/her former title. Upon receipt of such application for reappointment, the Personnel Director of the former agency shall remove the leave and reappoint the employee to his/her former title, provided that the employee continues to meet the qualification requirements and residence requirements applicable to said former title.

Employees who left their former agencies prior to the distribution of this PSB will be required to meet the same requirements as those who were given a leave of absence. Since no predetermination was made as to eligibility for reappointment, this must be done at time of application for reappointment. Ineligible employees must be notified in writing. Eligible competitive and labor class employees will be reinstated using Form DP-71. This form must be submitted by the Personnel Director of the hiring agency to the Control and Service Division of DCAS. The hiring agency should indicate on the top of the DP-71 form "Expedited Request Pursuant to PSB No. 200-10." If waiting for receipt of approval will result in the employee being off payroll, the agency should call the Control and Service Division to obtain verbal approval. However, the agency must also submit the DP-71 form. Eligible non-competitive employees will be reappointed using the Update Personnel Document (UPD).

C. Promotion Eligibility

Employees serving probationary periods in their subsequent positions will be permitted to file for and participate in promotion examinations from their former titles provided they meet all other eligibility requirements. If reached on such promotion lists, those probationers who accept promotion will be required to resign from their subsequent position.

William J. Diamond
Commissioner

Footnote 1: For the purposes of this PSB, the term "permanent employee" shall mean an employee serving in a position in the competitive, non-competitive, or labor class who has passed probation.

Footnote 2: These time limits may be waived for a covered employee appointed to his/her subsequent position after November 26, 1999, but prior to the publication of this policy, provided he/she meets all the requirements under this policy and was appointed to his/her subsequent position without a break in service.

Inquiries: Personnel Audits and Transactions (212) 232-0938 ***Issue No.*** 3-2000

Gmail fin macumhail <briantburke@gmail.com>

FW: CSC 2016-0925: Appeal of Brian Burke, 006158 - Request for Extension of Time to Respond to 12/2/16
1 message

appeals, civ (NYCCSC) <appeals@nyccsc.nyc.gov> Mon, Dec 12, 2016 at 8:33 AM
To: B <briantburke@gmail.com>
Cc: "Nolan, Kristen" <Kristen.Nolan@nyct.com>

Dear Mr. Burke:

Your submissions include a request to ignore NYCTA's response to our interim order as it was submitted late. The agency was granted an extension to December 2 and actually submitted via email on December 1. I apologize that you were omitted from our response when we granted the extension. I have included the email chain below for your records.

Please note that it is entirely within the Commission's discretion to consider any submission, whether timely or unrequested, before issuing its decision. In this case, our determination will be issued shortly.

--

Please be sure to "reply all," so all parties are copied.

Regards,

Petal M. Hwang | Agency Attorney

((212) 615-8915 | F: (212) 669-2727 | appeals@nyccsc.nyc.gov | www.nyc.gov/csc

NYC | **Civil Service Commission**
City of New York

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From: Nolan, Kristen [mailto:Kristen.Nolan@nyct.com]
Sent: Friday, November 18, 2016 2:54 PM
To: Hwang, Petal (NYCCSC)
Subject: RE: CSC 2016-0925: Appeal of Brian Burke, 006158 - Request for Extension of Time to Respond to 12/2/16

Thank you

From: Hwang, Petal (NYCCSC) [mailto:PHwang@nyccsc.nyc.gov]
Sent: Friday, November 18, 2016 2:53 PM
To: Nolan, Kristen
Subject: RE: CSC 2016-0925: Appeal of Brian Burke, 006158 - Request for Extension of Time to Respond to 12/2/16

Granted. Your response is due **December 2, 2016**.

--

Please be sure to "reply all," so all parties are copied.

Regards,

Petal M. Hwang | Agency Attorney

((212) 615-8915 | F: (212) 669-2727 | appeals@nyccsc.nyc.gov | www.nyc.gov/csc

NYC | Civil Service Commission
City of New York

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From: Nolan, Kristen [mailto:Kristen.Nolan@nyct.com]
Sent: Friday, November 18, 2016 2:35 PM
To: Hwang, Petal (NYCCSC)
Subject: FW: CSC 2016-0925: Appeal of Brian Burke, 006158 - Request for Extension of Time to Respond to 12/2/16
Importance: High

Dear Ms. Hwang:

I am writing to request a brief extension of time to respond to the attached appeal. Currently, NYCTA's response is due Monday, November 21, 2016. We have been extremely short staffed recently, and I have had depositions and witness prep every day this week. In order to properly investigate this issue and provide a thorough response, I respectfully request a two week extension of time to submit a response. Please contact me if this poses any problems.

Thank you,

Kristen M. Nolan
Executive Agency Counsel
New York City Transit Authority
130 Livingston Street – Rm 1213
Brooklyn, NY 11201
(718) 694-5720

Other purported errors that Burke cites represent the NYCTA's litigation position and background information provided by the NYCTA (for instance, that Burke was told to "quit or get off the gravy train," Opp. Br. at 19; that the switch from train operator to station agent was a demotion, *id.* at 16; or that inspectors entered his train to see if he was wearing corrective lenses, *id.* at 17). These alleged errors cannot form the basis for a defamation claim because under the Section 74 standard, journalists are not required to investigate the truth of allegations and cross-allegations made by litigants. *See, e.g., Glantz v. Cook United, Inc.*, 499 F. Supp. 710, 715 (E.D.N.Y. 1979) ("[E]ncompassed within the privilege [of Section 74] is the right to publish a 'fair and true' report which contains information that is 'false' as a matter of fact."); *Donaldson, Lufkin & Jenrette*, 161 Misc.2d 698, 705, 611 N.Y.S.2d 1019, 1023 (Sup. Ct. N.Y. County 1994) ("[T]he question is not whether or not the statement is 'true.' The question is whether it is a substantially accurate description of the . . . proceedings."), *aff'd*, 208 A.D.2d 301, 623 N.Y.S.2d 560 (1st Dep't 1995). The *Post* was not required to determine the truth or falsity of the NYCTA's litigation position, any more than it was required to determine the truth or falsity of the allegations in Burke's complaint. *Reeves v. ABC, Inc., 719 F.2d 602, 606 (2d Cir. 1983)* ("The 'fair and true standard' does not require the reporter to resolve the merits of the charges."); *Lan Sang v. Ming Hai & Law Offices of Ming Hai, P.C.*, 951 F.Supp.2d 504, 521 (S.D.N.Y. 2013) ("The absolute privilege under Section 74 also 'extends to the release of background material with regard to the case, so long as the statement is a substantially accurate description of the allegation,' including 'where the description of the case is offered by a party's legal counsel.'") (quoting *Fishof v. Abady*, 720 N.Y.S.2d 505, 505, 280 A.D.2d 417 (1st Dep't 2001). Indeed, the policy behind Section 74 is to enable the media to report on allegations without fear of liability for defamation should the allegations ultimately prove false. *Freeze Right*, 101

NYP HOLDINGS & BONGELLO REPLY PG4 EXHIBIT

- quoted Burke as stating, "Rev. Sharpton was accused of 'ratting out the mob' and I maybe [sic] justly accused of 'ratting out the MTA.' I believe the MTA may be more dangerous. There is [sic] 600 volts, high structure, 600 ton trains and an infinite way to be murdered or 'suicided.'" (Calman Decl. Exs. B & C (quoting Dkt. #1 at 26)).

The article also referred to other judicial and administrative proceedings involving Mr. Bu including a case involving his previous employment with the Census Bureau, *Burke v.* (, No. 04-cv-7593 (S.D.N.Y) (filed 2004).[2] The article also referred to transit sources, in the Article, who told the *Post*, among other things, that:

- Burke's previous claims had been shot down by courts or the Public Employee Relations Board;
- The Board rejected his claim that he was assaulted by a boss in 2007;
- Burke refused to remove his tinted glasses at a 2014 Board hearing, which prompted supervisors to check on him in April;
- Burke was making $71,000 a year as a train operator, but after he lost a worker's compensation case, the MTA gave him a choice to "quit or get off the gravy train."

D. The Amended Complaint

On June 26, 2015, plaintiff amended his complaint in this action, adding NYP Holdings and Boniello as defendants (the "Amended Complaint"), along with other Nolan and Akselrod.

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[2] The court in that case granted summary judgment for defendants, holding, *inter alia*, that Burke had not demonstrated that he had been constructively terminated for discriminatory reasons. Memorandum and Order, *Burke v. Gutierrez*, No. 04-cv-7593, Dkt. #45 (S.D.N.Y. Jan 12, 2006). This Court can take judicial notice of that decision. *In re Zyprexa Prods. Liab. Litig.*, 549 F. Supp. 2d 496, 501 (E.D.N.Y. 2008).

NYP HOLDINGS & BONIELLO MTD MEMORANDUM EXHIBIT

- quoted Burke as stating, "Rev. Sharpton was accused of 'ratting out the mob' and I maybe [sic] justly accused of 'ratting out the MTA.' I believe the MTA may be more dangerous. There is [sic] 600 volts, high structure, 600 ton trains and an infinite way to be murdered or 'xxcluded.'" (Catrain Decl. Exs. B & C (quoting Dkt. 61 at 26)).

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- Burke's previous claims had been shot down by courts or the Public Employee Relations Board;
- The Board rejected his claim that he was assaulted by a boss in 2007;
- Burke refused to remove his tinted glasses at a 2014 Board hearing, which prompted supervisors to check on him in April;
- Burke was making $71,000 a year as a train operator, but after he lost a worker's compensation case, the MTA gave him a choice to "quit or get off the gravy train."

B. The Amended Complaint

On June 26, 2015, plaintiff amended his complaint in this action, adding NYP Holdings and Bonicello as defendants (the "Amended Complaint"), along with other Nolan and Akselrod.

[3] The court in that case granted summary judgment for defendants, holding, *inter alia*, that Burke had not demonstrated that he had been constructively terminated for discriminatory reasons. Memorandum and Order, *Burke v. Gutierrez*, No. 04-cv-7593, Dkt. 45 (S.D.N.Y. Jan 12, 2006). This Court can take judicial notice of that decision. *In re* [illegible] Sec. Litig., 549 F. Supp. 2d 496, 501 (E.D.N.Y. 2008).

NEW YORK STATE
CIVIL SERVICE COMMISSION
---X

BRIAN BURKE,

Appellant,

-against-

MTA NEW YORK CITY TRANSIT AUTHORITY,

Appellee.

---X

CSC No.: 2016-0925

AFFIDAVIT OF PATRICK SMITH

PATRICK SMITH, being duly sworn, deposes and says:

1. I am employed by the New York City Transit Authority ("NYCTA") as a Chief Officer, Strategic and Business Partnerships in the Human Resources Division ("Human Resources") and have held various human resources positions at NYCTA for over twenty-two years.

2. As Chief Officer, I am responsible for, among other things, oversight of a wide variety of Civil Service-related activities involving NYCTA employees who are subject to various Civil Service rules and statutory provisions, including ensuring that Civil Service based titles in NYCTA are filled in accordance with the rules and regulations of the State of New York, the requirements of the New York Civil Service laws and the Personnel Rules and Regulations of the City of New York.

3. I am familiar with the attached "Reclassification Consideration Request Due to a Disability" which is a standard form, duly executed by Appellant Brian Burke and witnessed by an employee in my unit, on March 13, 2015. This document has been maintained by NYCTA in the ordinary course of business as a business record since that time. A true and accurate copy is attached hereto as Exhibit A, and was sent to Ms. Nolan, by me, on December 6, 2016.

4. Indeed, any civil service employee at NYCTA who requests, and is granted, a new position due to a disability is deemed a "voluntary transfer" per Personnel Services Bulletin ("PSB") 200-6R (D)(2)(b) and is required to serve a probationary period. A true and accurate copy of PSB 200-6R is attached hereto as Exhibit B.

5. There is not – and never has been – any requirement at NYCTA that the "Reclassification" form be signed in a specific color of ink.

Dated: Brooklyn, New York
December 8, 2016

PATRICK SMITH

Sworn to before me
on this 8th day of December, 2016

Notary Public

ALEXANDER D. FISHER
NOTARY PUBLIC, State of New York
Registration No. 01FI6250465
Qualified in Kings County
Commission Expires: October 24, 2019

Employer Exhibit B

Grievance Number: CI-2015-0548
Date Submitted: 9/3/2015 / 4/25/2016
Monies Owed
Employee :(S) Brian Burke #006158 (Retired Disability)
Department: Stations
Date of Step 1 Hearing: 5/17/16

Cite Contract Section No., Written Rule or Resolution of the Authority violated:
CBA Section 3.8A, B #1, Section 2.4 A, Section 2.6 A, E, Q and all other relevant sections

Union Position:
Retired SA Burke is a former Train Operator who was medically reclassified to Station Agent in March 2015. He was in training from the pay period 3/22-4/6/15, and did not receive pay for a total of 83 hours. Member requests to be paid for 6 hours overtime while training two three hour security terrorism courses. Member requests to be paid for 12 sick days, 14 vacation days and 1 PLD. Member applied for and has not received 60% sick pay for 60 days in 2015.

Remedy Sought:
To make SA Burke whole by paying him all back pay associated with this case.

Decision:
According to CBA Section 3.8 A, B #1, Section 2.4A, Section 2.6 A, E, Q, grievant was paid all pay requested within this grievance.

Therefore this grievance is denied.

9/22/16

Hearing Officer **Date**

Date Received: ____________

Accept this Decision: ____________ **Appeal this Decision:** ________

Employee **Date** **Union Representative**

Copy of Grievance must be attached to this Decision

New York City Transit Authority
Treasury Department, Room 7085
130 Livingston Street, Brooklyn NY 11201

Pay Group: TWB-NYCT Hourly B
Pay Begin Date: 03/20/16
Pay End Date: 04/02/16

Business Unit: NYCTA
Check #: 727415
Check Date: 04/07/16

Brian T Burke
145 East 23rd Street, Apt.4r
New York NY 10010
BSC Empl ID: 1195069
Agency Pass Number: 006158

Dept: 2732 L3: 2700
Location: NYCTA
Pay Rate: $33.826668 Hourly
Pension Number: 546654
Pen Gross: $0.00 YTD: $3,072.47

TAX DATA:	Federal	NY State	Local
Marital Status:	Single	Single	Single
Allowances:	1	1	1
Addl. Pct.:			
Addl. Amt.:			

HOURS AND EARNINGS

	----- Current -----			----- YTD -----	
Description	Rate	Hours	Earnings	Hours	Earnings
Shoes/Tools/Uniform Allow.			50.00		50.00
Scheduled Overtime			0.00	5.58	188.75
NYCT O/T Bonus			0.00	2.00	33.83
Regular Pay			0.00	84.25	2,849.89

TAXES

Description	Current	YTD
Fed Withholdng	0.00	530.40
Fed MED/EE	0.73	45.28
Fed OASDI/EE	3.10	193.59
NYS Withholdng	0.00	164.57
NYC Withholdng	0.00	102.17
Total:	3.83	1,036.01

BEFORE-TAX DEDUCTIONS

Description	Current	YTD
Pension	0.00	61.45
Total:	0.00	61.45

AFTER-TAX DEDUCTIONS

Description	Current	YTD
Charity	0.00	2.0
TransportWrkrUnionLocal	0.00	4.0
Disability Deduction	0.00	2.4
NYCT-TWU-Local 100	0.00	58.0

8510021782 ©2016 RR Donnelley - 0221

Form **W-2 Wage and Tax Statement** 2016

Box	Value
c Employer's name, address, and ZIP code	NEW YORK CITY TRANSIT TREASURY DEPARTMENT, ROOM 7085 130 LIVINGSTON STREET BROOKLYN NY 11201
e Employee's name, address, and ZIP code	BRIAN T BURKE 145 EAST 23RD STREET APT.4R NEW YORK NY 10010
7 Social security tips	
8 Allocated tips	
9	
10 Dependent care benefits	
b Employer identification number (EIN)	11-6002815
a Employee's social security number	[redacted]
13 Statutory employee / Retirement plan / Third-party sick pay	Retirement plan: X
1 Wages, tips, other compensation	3061.02
3 Social security wages	3122.47
5 Medicare wages and tips	3122.47
11 Nonqualified plans	
14 Other	414H 61.45
2 Federal income tax withheld	530.40
4 Social security tax withheld	193.59
6 Medicare tax withheld	45.28
12a See instructions for box 12	DD 244.96
12b	
12c	
12d	

15 State	Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name
NY	11-6002815	3061.02	164.57	3061.02	102.17	NYC

Copy C—For EMPLOYEE'S RECORDS (See *Notice to Employee* on the back of Copy B.) Dept. of the Treasury - IRS

OMB No. 1545-0008

Form **W-2 Wage and Tax Statement** 2016

Box	Value
c Employer's name, address, and ZIP code	NEW YORK CITY TRANSIT TREASURY DEPARTMENT, ROOM 7085 130 LIVINGSTON STREET BROOKLYN NY 11201
e Employee's name, address, and ZIP code	BRIAN T BURKE 145 EAST 23RD STREET APT.4R NEW YORK NY 10010
7 Social security tips	
8 Allocated tips	
9	
10 Dependent care benefits	
b Employer identification number (EIN)	11-6002815
a Employee's social security number	[redacted]
13 Statutory employee / Retirement plan / Third-party sick pay	Retirement plan: X
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11 Nonqualified plans	
14 Other	414H 61.45
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12a See instructions for box 12	DD 244.96
12b	
12c	
12d	

15 State	Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name
NY	11-6002815	3061.02	164.57	3061.02	102.17	NYC

Copy B—To Be Filed With Employee's FEDERAL Tax Return. This information is being furnished to the Internal Revenue Service. Dept. of the Treasury - IRS

OMB No. 1545-0008

Form **W-2 Wage and Tax Statement** 2016

Box	Value
c Employer's name, address, and ZIP code	NEW YORK CITY TRANSIT TREASURY DEPARTMENT, ROOM 7085 130 LIVINGSTON STREET BROOKLYN NY 11201
e Employee's name, address, and ZIP code	BRIAN T BURKE 145 EAST 23RD STREET APT.4R NEW YORK NY 10010
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8 Allocated tips	
9	
10 Dependent care benefits	
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13 Statutory employee / Retirement plan / Third-party sick pay	Retirement plan: X
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11 Nonqualified plans	
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15 State	Employer's state ID number	16 State wages, tips, etc.	17 State income tax	18 Local wages, tips, etc.	19 Local income tax	20 Locality name
NY	11-6002815	3061.02	164.57	3061.02	102.17	NYC

Copy 2—To Be Filed With Employee's State, City, or Local Income Tax Return Dept. of the Treasury - IRS

OMB No. 1545-0008

Form **W-2 Wage and Tax Statement** 2016

Box	Value
c Employer's name, address, and ZIP code	NEW YORK CITY TRANSIT TREASURY DEPARTMENT, ROOM 7085 130 LIVINGSTON STREET BROOKLYN NY 11201
e Employee's name, address, and ZIP code	BRIAN T BURKE 145 EAST 23RD STREET APT.4R NEW YORK NY 10010
7 Social security tips	
8 Allocated tips	
9	
10 Dependent care benefits	
b Employer identification number (EIN)	11-6002815
a Employee's social security number	
13 Statutory employee / Retirement plan / Third-party sick pay	Retirement plan: X
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3 Social security wages	3122.47
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NY	11-6002815	3061.02	164.57	3061.02	102.17	NYC

Copy—2 To Be Filed with Employee's State, City, or Local Income Tax Return Dept. of the Treasury - IRS subsequently terminated her from her position as a bus driver because she was medically disqualified from performing that job. (Def.'s Br. at 11.) This position is baffling in light of the Transit Authority's contention that Plaintiff was "employed" by the Transit Authority until her death. As the Transit Authority explains, "[b]ased upon a directive by Richard Adelman, the arbitrator in a related matter, the [June 14, 2005] termination of Ms. Lewis's employment was rescinded by letter, dated August 8, 2005; and until her death in 2012, Ms. Lewis remained in the title of bus operator at the [Transit Authority], although she never again performed actual work at the [Transit Authority]." (Def.'s Br. at 7.) Since Lewis was "employed" by the Transit Authority, she had no obligation to mitigate her damages by seeking additional employment.[5]

III. Lewis's Alleged Failure to Comply with EEOC Requirements

A. Timely EEOC Charge

"Exhaustion of administrative remedies through the EEOC is an essential element of the Title VII ... statutory scheme[] and, as such, a precondition to bringing [a Title VII claim] in federal court." *Legnani v. Alitalia Linee Aeree Italiane, S.P.A.*, 274 F.3d 683, 686 (2d Cir. 2001) (per curiam). The purpose of the exhaustion requirement—namely, to encourage settlement of

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[5] In any event, the Transit Authority has not met its burden to demonstrate that Lewis did not make reasonable efforts to find alternative employment. A "prevailing plaintiff in a Title VII [discriminatory termination] case must attempt to mitigate her damages...." *Dailey v. Societe Generale*, 108 F.3d 451, 455 (2d Cir. 1997). It is the *employer* who must prove either: (1) "that suitable work existed, and[]that the employee did not make reasonable efforts to obtain it," *Broadnax v. New Haven*, 415 F.3d 265, 268, 270 (2d Cir. 2005), or (2) that "the employee made no reasonable efforts to seek such employment," regardless of whether suitable alternatives were available, *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 53-54 (2d Cir. 1998). The Transit Authority does not attempt to prove the former. To prove the latter, the Transit Authority must do more than point to Lewis's ambiguous deposition testimony. Lewis testified that she had not applied to other positions because she was hoping to return to the Transit Authority. (Def.'s Br. at 11 n.36, citing Pl.'s 56.1 Stmt. Ex.4, Lewis Dep. 416-417.) As in *Broadnax*, this testimony "could mean either that she had not sought other employment, or she tried and failed," and thus does not establish that the Lewis failed to make any reasonable efforts to mitigate her damages. *Broadnax*, 415 F.3d at 270.

5) That the employee was duly examined by the Authority's designated physician after the accident.

6) That the employee did return for re-examination on every occasion when directed by the Authority or its designated physician.

7) That the employee did report for any work within title which he/she was deemed medically qualified to perform.

In certifying that the conditions as aforesaid have been met the Director of Workers' Compensation of the Transit Authority or his/her designee in addition to using the information available to him/her from the files in his/her bureau may call upon the Director of the System Safety Department of the Transit Authority, the Medical Department of the Transit Authority, and any other bureau or department of the Transit Authority to furnish in writing to the said Director of Workers' Compensation of the Transit Authority's Compensation Bureau such facts and information as he/she may deem necessary to properly make such certification. The Director of Workers' Compensation of the Compensation Bureau or his/her designee may call for such facts and information and head of the System Safety Department, the Medical Department of the Transit Authority, and all other bureaus and departments of the Transit Authority are hereby directed to furnish the facts and information so called for by said Director of Workers' Compensation of the Compensation Bureau or his/her designee.

Following certification of the above, the Director of Workers' Compensation of the Compensation Bureau or his/her designee, shall have the power, subject to and in accordance with the provisions above set forth, to grant differential pay. VARIABLE A ELECTION

B1. An employee absent because of disability which he/she claims to be service-connected and who has accrued sick leave or vacation time will, on request, be granted eight hours pay for each work day absent beginning with the eleventh consecutive work day of absence. Such payments which will be made currently as a regular pay check, will be charged against the employee's accrued sick leave and vacation time, and will continue until such accrued time has been exhausted or until the employee returns to work whichever comes first.

B2. In the event that the employee's Workers' Compensation claim is not controverted by the Transit Authority, or is upheld and an award made to the employee by the Workers' Compensation Board, the amount of payment made pursuant to (1) above will be a charge against the award and a number of days equivalent to that amount charged against the award shall be restored to the employee's sick leave and/or vacation bank.

B3. The payments from accrued sick leave and vacation time herein provided for are intended only as a convenience for the employee and in no way affect the employee's claim for differential pay, which claim will be processed pursuant to and be governed, as heretofore, by the provisions of Section 2.7 A.

5) That the employee was duly examined by the Authority's designated physician after the accident.

6) That the employee did return for re-examination on every occasion when directed by the Authority or its designated physician.

7) That the employee did report for any work within title which he/she was deemed medically qualified to perform.

In certifying that the conditions as aforesaid have been met the Director of Workers' Compensation of the Transit Authority or his/her designee in addition to using the information available to him/her from the files in his/her bureau may call upon the Director of the System Safety Department of the Transit Authority, the Medical Department of the Transit Authority, and any other bureau or department of the Transit Authority to furnish in writing to the said Director of Workers' Compensation or the Transit Authority's Compensation Bureau such facts and information as he/she may deem necessary to properly make such certification. The Director of Workers' Compensation of the Compensation Bureau or his/her designee may call for such facts and information and head of the System Safety Department, the Medical Department of the Transit Authority, and all other bureaus and departments of the Transit Authority are hereby directed to furnish the facts and information so called for by said Director of Workers' Compensation of the Compensation Bureau or his/her designee.

Following certification of the above, the Director of Workers' Compensation of the Compensation Bureau or his/her designee, shall have the power, subject to and in accordance with the provisions above set forth, to grant differential pay.

B1. An employee absent because of disability which he/she claims to be service-connected and who has accrued sick leave or vacation time will, on request, be granted eight hours pay for each work day absent beginning with the eleventh consecutive work day of absence. Such payments which will be made currently as a regular pay check, will be charged against the employee's accrued sick leave and vacation time, and will continue until such accrued time has been exhausted or until the employee returns to work whichever comes first.

B2. In the event that the employee's Workers' Compensation claim is not controverted by the Transit Authority or is upheld and an award made to the employee by the Workers' Compensation Board, the amount of payment made pursuant to (1) above will be a charge against the award and a number of days equivalent to that amount charged against the award shall be restored to the employee's sick leave and/or vacation bank.

B3. The payments from accrued sick leave and vacation time herein provided for are intended only as a convenience for the employee and in no way affect the employee's claim for differential pay, which claim will be processed pursuant to and be governed, as heretofore, by the provisions of Section 1.7 A.

Blumberg's Law Products T 1183— Notice of Claim against a Public Authority Pursuant to §50 General Municipal Law : Not for use in the Court of Claims : 6-81

BlumbergExcelsior, Inc., PUBLISHER, NYC 10013

In the Matter of the Claim of

BRIAN BURKE

V

NEW YORK CITY TRANSIT AUTHORITY

TO:

PLEASE TAKE NOTICE that the undersigned claimant(s) hereby make(s) claim and demand against you as follows:

1. The name and post-office address of each claimant and claimant's attorney is:

BRIAN BURKE, PRO SE
145 EAST 23RD ST #4R
NEW YORK, NY 10010

2. The nature of the claim: DEFAMATION, SLANDER, LIBEL, CONSPIRACY TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE CIVIL & CRIMINAL HARASSMENT 42 USC. 1983 CONSTRUCTIVE TERMINATION VIOLATIONS OF FEDERAL & NY STATE RICO (FRAUD, ETC) AMERICANS WITH DISABILITIES ACT FEDERAL NY STATE AND LOCAL ANTIDISCRIMINATION AND ANTI-RETALIATION LAWS HOSTILE WORKPLACE

3. The time when, the place where and the manner in which the claim arose:

ON MARCH 29, 2015 ATTORNEY KRISTEN NOLAN, esq OF THE NYCTA DEPARTMENT OF LAW WROTE OR DICTATED A MALICIOUS, DELIBERATELY FALSE LIBEL AND HAD SAME DISSEMINATED AT WORKPLACE, THROUGHOUT NYCTA AND ONLINE AT MTA TODAY, ETC OVER THE FOLLOWING WEEK. THIS CAUSED INJURY TO CLAIMANT DUE TO HOSTILE WORKPLACE DUE TO RETALIATION

4. The items of damage or injuries claimed are (do not state dollar amounts)

LOSS OF WAGES FROM APRIL 6, 2015
MEDICAL COSTS FROM APRIL 6, 2015
LEGAL COSTS
INJURY TO REPUTATION
DAMAGE TO HEALTH
LOSS OF EMPLOYMENT AND BENEFITS

2015 JUN 19 PM 4:45
CLAIMS [illegible]

The undersigned claimant(s) therefore present this claim for adjustment and payment. You are hereby notified that unless it is adjusted and paid within the time provided by law from the date of presentation to you, the claimant(s) intend(s) to commence an action on this claim.

Dated: June 19, 2015

[signature]

The name signed must be printed beneath

BRIAN BURKE

The name signed must be printed beneath

Attorney(s) for Claimant(s)
Office and Post Office Address, Telephone Number

BRIAN BURKE, PRO SE
145 EAST 23RD ST #4R
NEW YORK, NY 10010
646-434-8513

INDIVIDUAL VERIFICATION

State of New York, County of ss.:

Brian Burke
being duly sworn, deposes and says that deponent is the claimant in the within action; that ..he has read the foregoing Notice of Claim and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.

[signature]
BRIAN BURKE PRO SE

Sworn to before me, this 19th
day of June, 2015

[signature]

STEVEN E. HILLER
Notary Public, State of New York
No. 01HI4507658
Qualified in New York County
Commission Expires November 30, 2017

CORPORATE VERIFICATION

State of New York, County of ss.:

being duly sworn, deposes and says that deponent is the
of
corporate claimant named in the within action; that deponent has read the foregoing Notice of Claim and knows the contents thereof, and that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true.

This verification is made by deponent because said claimant is a corporation, and deponent an officer thereof, to wit its
The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me, this
day of

In the Matter of the Claim of

Notice of Claim Against

Attorney(s) for Claimant(s)
Office and Post Office Address

FILED
IN CLERK'S OFFICE
U S DISTRICT COURT E.D.N.Y.
★ APR 14 2017 ★
BROOKLYN OFFICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

X

BRIAN BURKE

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY,
JOHN/JANE DOE, ET AL.

Defendant.

X

Affirmation of Service

15 CV 1481 (ENV/)

I, BRIAN BURKE, declare under penalty of perjury that I have served a copy of the attached PLAINTIFF'S OPPOSITION TO MOTION TO DISMISS & EXHIBITS upon DANIEL CHIU, ESQ, NYC TRANSIT AUTHORITY DEPARTMENT OF LAW whose address is: 130 LIVINGSTON STREET, FL12 BROOKLYN, NY 11201-5106 BY USPS AND EMAIL

Dated: 4/14/17
BROOKLYN, New York

[signature]
Signature

145 EAST 23RD STREET APT 4R
Address

NEW YORK, NY 10010
City, State, Zip Code

ORIGINAL + AFFIRMATION OF SERVICE
BURKE V NYCTA
15-CV-1481

USPS TRACKING™ INCLUDED*

INSURANCE INCLUDED*

PICKUP AVAILABLE

* Domestic only

WHEN USED INTERNATIONALLY, A CUSTOMS DECLARATION LABEL MAY BE REQUIRED.

FROM:

D CLERK CONT

TO:

PS00000000013

EP14 July 2013
OD: 11.625 x 15.125

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DuPont™ Tyvek®
Protect What's Inside™